

June 1983

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Recommended Citation

Anthony F. Bartlett Pace University School of Law, *Employment Discrimination and Labor Arbitrators: A Question of Competence*, 85 W. Va. L. Rev. (1983).

Available at: <https://researchrepository.wvu.edu/wvlr/vol85/iss5/5>

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EMPLOYMENT DISCRIMINATION AND LABOR ARBITRATORS: A QUESTION OF COMPETENCE

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During the Second World War labor arbitration came to prominence in the United States as an important means of resolving disputes between labor and management. In the post-War years it gradually achieved a pre-eminent position in the American collective bargaining system, finally acquiring the imprimatur of the Supreme Court in 1960. Crucial to the Court's rationale for requiring virtual judicial abstention in regard to labor arbitration was its perception of the arbitration process as an informal and flexible system manned by arbitrators who were in possession of a high level of competence in the realities of labor relations. This view of arbitral expertise was not seriously challenged until the Court's decision in *Alexander v. Gardner-Denver Co.*¹ in which it was held that prior submission of a minority person's dispute with a company to arbitration under the terms of a collective bargaining agreement did not foreclose access to federal court under the provisions of Title VII of the Civil Rights Act of 1964.² The essentially private machinery of labor arbitration was felt to be inadequate for coping with the important public policy issues behind employment discrimination legislation.³ The Supreme Court, however, did not totally deny any useful role to labor arbitration where minority rights were concerned. In its famous Footnote 21⁴ of *Gardner-Denver*, it stated that varying degrees of weight would be accorded an arbitrator's award insofar as certain criteria were met.⁵ One such criterion was the "special competence of

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¹ 415 U.S. 36 (1974).

² 42 U.S.C. §§ 2000e (1) to (17) (1976), amending 42 U.S.C. §§ 2000e-15 (1970).

³ In *Gardner-Denver*, the Court noted that: "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." 415 U.S. at 56.

⁴ *Id.* at 60.

⁵ The Court provided the following guidelines:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Gardner-Denver, 415 U.S. at 60 n.21.

particular arbitrators."⁶

This Article examines the competence which labor arbitrators are said to possess generally, with particular reference to its potential for application where employment discrimination is also involved, in the hope of shedding some light upon the "special competence" requirement of Footnote 21. Such an undertaking demands, of necessity, an analysis and evaluation of the total process within which arbitral competence is exercised. Relevant aspects of this will therefore be considered. Part I will deal with arbitral expertise as manifested in the resolution of disputes over the interpretation and application of the terms of collective agreements and will include evaluations of this traditional function of the arbitration system from the sometimes varying viewpoints of the courts, labor and management, arbitration scholars, and some of the more celebrated critics of labor arbitration. Part II will examine features of the arbitration process which might serve to detract from its usefulness as an adjudicative mechanism where employment discrimination matters are linked to disputed terms of a collective agreement—such as evidence admission and procedure at the arbitration hearing—and which therefore highlight the nature of judicial concern as to the adequacy of arbitration to redress discrimination. Also examined is the caution expressed by the Court in relation to the qualifications of labor arbitrators in dealing with the more stringent requirements of Title VII, as opposed to the purely voluntary objectives of collective agreements. Part III will consist of an analysis of the problems involved in attempting to construct an accommodation between the function for which labor arbitration was originally established and the public policy objectives of Title VII, as well as an evaluation of the impact of arbitral competence in this controversial area.

I. THE TRADITIONAL ROLE

Arbitration as a means of resolving industrial conflict between unions and employers was used on a sporadic basis from the late nineteenth century to the beginning of the Second World War.⁷ During the War it achieved a singular degree of acceptance from both sides of industry as the primary means of adjusting differences arising from the collective bargaining relationship,⁸ and the National War Labor Board was established to provide the services of arbitrators in order to maintain the highest possible level of industrial stability in furtherance of the War effort.⁹ The competence of labor arbitrators in this period in dealing with the issues referred to them was unquestioned, and many persons who are today representative of the highest degree of arbitral integrity and skill first made their reputations with the War Labor Board.¹⁰ The alter-

⁶ *Id.*

⁷ See R. FLEMING, *THE LABOR ARBITRATION PROCESS* 1-14 (1965) [hereinafter cited as FLEMING].

⁸ H. METZ, *LABOR POLICY OF THE FEDERAL GOVERNMENT* 263-66 (1945).

⁹ J. LOEWENBERG, *Compulsory Arbitration in the United States*, *COMPULSORY ARBITRATION, AN INTERNATIONAL COMPARISON* 141, 143 (1976).

¹⁰ M. HERZOG & M. STONE, *Grievance Arbitration in the United States*, *COLLECTIVE BARGAIN-*

native to industrial strife which the arbitration process presented was not lost on many employers and unions; and so agreements to arbitrate collective bargaining disputes and differences over the interpretation and application of collective agreements were made subject to arbitration on a voluntary basis in many industries in the post-War years.¹¹

The Taft-Hartley Act of 1947¹² had as one of its more significant measures a provision making collective agreements legally enforceable as contracts.¹³ This, together with an accompanying provision encouraging the resolution of differences by voluntary means between the parties,¹⁴ gave the collective agreement firm legislative backing as the source of rights and obligations between labor and management.¹⁵ The basic skills required of labor arbitrators became those of contract interpretation and application, and they would appear to have exercised them ably, as testified in part by the fact that by the mid-1950s over 90 percent of American collective agreements had grievance procedures culminating in arbitration.¹⁶ Arbitral competence was largely assumed as a given feature in these years; the more important issue was the legal status of an arbitrator's award. Earlier, a serious challenge to the constitutional validity of that section of Taft-Hartley—section 301—which made the source of an arbitrator's award, the collective agreement, legally enforceable had been mounted,¹⁷ but the Supreme Court affirmed the constitutionality of the section

ING 212, 214-216 (A. Flanders 1969).

¹¹ *Id.* at 215.

¹² Labor Management Relations Act (Taft-Hartley), 29 U.S.C. §§ 141-97 (1976) [hereinafter cited as LMRA].

¹³ *Id.* at § 301(a) 29 U.S.C. § 185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

¹⁴ *Id.* § 203(d). 29 U.S.C. § 173(d) provides, in pertinent part:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

¹⁵ One author commented:

Section 301's provision for damage suits by employers and unions against each other for breach of contract and its designation of the federal courts to enforce both agreements to arbitrate and arbitration awards have contributed without doubt in some degree to improving both the quality and stability of contract administration.

H. DAVEY, *CONTEMPORARY COLLECTIVE BARGAINING* 80 (3d ed. 1972) [hereinafter cited as H. DAVEY].

¹⁶ H. DAVEY, *LABOR ARBITRATION: A CURRENT APPRAISAL, INDUSTRIAL AND LABOR RELATIONS REVIEW* 85 (1955-56).

¹⁷ The basis of the challenge was that § 301 required a federal substantive law for the enforcement of collective agreements, in violation of article III, section 2 of the Constitution which provides, in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and — to controversies — between citizens of different states. . . ."

Prior to the enactment of § 301 the law relating to collective agreements was state law under which such agreements were not, in general, enforceable. See Bartlett & Lowry, *Collective Agreements in the United States and Britain: Status and Consequences*, 1979 UTAH L. REV. 469, 470-75 (1979). It was accordingly alleged that Congress was creating a federal procedural right of action

in its celebrated *Lincoln Mills* decision.¹⁸ This timely salvaging of section 301 assured the survival and growth of the arbitration process to the extent that by 1966 over 94 percent of collective agreements had binding arbitration as the terminal step in their grievance procedures.¹⁹

The status of an arbitral award, or in a wider context, the relationship between the arbitration process and the courts, had been put in question by a New York Court as early as 1947 in the *Cutler-Hammer*²⁰ decision, which an arbitration scholar termed the "bete noir" of labor arbitrators.²¹ That court found that a clause in a collective agreement providing for arbitration of a disputed matter was to be treated as any other term in any other type of contract and denied any unique role to a labor arbitrator.²² This construction

where there was no federal substantive law.

Further, as § 301(a) purported to waive the diversity jurisdiction, the best that the section provided, it was felt, was for a new forum - i.e. a federal one - wherein state law would be applied; see *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

If the section is given the meaning its language spontaneously yields, it would seem clear that all it does is to give procedural directions to the federal courts. "When an unincorporated association that happens to be a labor union appears before you as a litigant in a case involving breach of a collective agreement," Congress in effect told the district judges, "treat it as though it were a natural or corporate legal person and do so regardless of the amount in controversy and do not require diversity of citizenship."

Id. at 443.

¹⁸ *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). This landmark decision resulted from an action by a union to compel an employer to arbitrate certain grievances arising under their collective agreement and arbitrable under the applicable arbitration clause. The Supreme Court found that Congress, in pursuance of its authority under the Commerce Clause of the Constitution, had the power to create a federal substantive law for the enforcement of collective agreements. *Id.* at 457. The Court outlined where this new federal law could be found:

We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Id. at 456-57 (citations omitted).

¹⁹ BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES, BULL. NO. 1425-26, at 5 (1966).

²⁰ *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

²¹ B. ADELL, THE LEGAL STATUS OF COLLECTIVE AGREEMENTS IN ENGLAND, THE UNITED STATES AND CANADA 92 (1970).

²² It is for the Court to determine whether the contract contains a provision for arbitration of the dispute tendered, and in the exercise of that jurisdiction the Court must determine whether there is such a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.

Cutler-Hammer, 67 N.Y.S.2d at 318.

seemed feasible, as on its face, section 301(a) granted access to courts for enforcement of a promise to arbitrate grievances, and after *Lincoln Mills* such promises could be specifically enforced.²³ The *Cutler-Hammer* tendency in some lower courts posited a conflict between the potential for a court to exercise its contract interpretation capacity in relation to arbitration clauses in collective agreements and the purely private and self-governing role which was considered by many to be an essential feature of labor arbitration.²⁴ However, prevention of a widespread interventionist role for the judiciary in the arbitration process was made the order of the day by the Supreme Court in its seminal *Steelworkers' Trilogy*,²⁵ which gave labor arbitration the august role in American collective bargaining which it holds to the present.²⁶

The Court stated that the judicial function was to be limited to determining whether or not a particular collective agreement provided for disputed subject-matter to be arbitrated,²⁷ and if so provided, all disputes must go to arbitration, not merely those which a court might deem meritorious.²⁸ Any doubt as to arbitrability was to be resolved in favor of arbitration.²⁹ The Court placed a limit on this wide-ranging allocation of authority to arbitrators by declaring that an arbitral award would be protected from judicial overthrow only where

²³ *Lincoln Mills*, 353 U.S. at 456.

²⁴ See, e.g., Beneduce, *Labor Arbitration and the Courts*, 5 ARB. J., 169 (1950).

In view of the fact that the principal value of arbitration is the fact that it is a speedy method of resolving labor controversies by arbitrators who are skilled in labor relations, this tendency of the courts to decide cases on their merits is a cause of serious concern. If this trend continues there will soon be a decline of arbitration as a mode of settling labor controversies, which decline would unquestionably be a backward step in the development of the peaceful settlement of labor disputes.

Id. at 172.

See also Guthrie, *Arbitration and Industrial Self-Government*, 1958 PROC. OF THE ELEVENTH ANN. MEETING NAT'L ACAD. OF ARB., VII.

[A] system of arbitration as the terminal point in the grievance procedure is essential for the functioning of industrial self-government. It not only provides a final resolution of such disputes, which is very important, but it is also a system within the control of the parties. The judge who determines the dispute is selected by them, and they may agree and stipulate the powers which he will wield. Thus they have fashioned their own legislation, and have created their own scheme of administration.

Id. at XII.

²⁵ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). When referred to collectively these decisions will be cited as the *Steelworkers' Trilogy* in the remainder of this article.

²⁶ Smith, *Arbitrability - The Arbitrator, The Courts and the Parties*, 17 ARB. J. 3 (1962):

The United States Supreme Court, in the necessarily uneven distribution of the wealth of its legal resources, has dealt generously with the labor lawyers of the country. In our field which is relatively new, one can think off-hand of a substantial number of "landmark", if not epochal, decisions, which have had a major impact in shaping labor relations law — The Court's June, 1960 trilogy of decisions — must be counted an important addition to this group."

Id.

²⁷ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

²⁸ *Id.*

²⁹ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

its essence was based on the collective agreement.³⁰ The Court compiled a taxonomy of the advantages that it alleged were possessed by the arbitration process and labor arbitrators. For present purposes it is sufficient to note that it considered an arbitrator to be in possession of a "common law" of collective bargaining which underlay the wording of collective agreements³¹ and that judges apparently did not share this specialized knowledge.³² The Court elaborated further on what it considered to be the extraordinary competence held by arbitrators:

The parties expect that his [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.³³

This generous pronouncement on arbitral skill and experience would require much more than the exercise of fundamental contract interpretation techniques, even though such techniques theoretically form the basis of the parties' assessment of an arbitrator's competence.³⁴ Far from wishing to be considered in possession of the knowledge and experience deemed necessary by the Supreme Court, many prominent arbitrators denied any other role to themselves than that of the interpretation and application of disputed terms of a collective agreement.³⁵

³⁰ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960): [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

See also *Torrington v. Metal Product Workers' Union*, 362 F.2d 677 (2d Cir. 1966).

³¹ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

³² *Id.* at 581. The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.

³³ *Id.* at 582.

³⁴ F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 297 (3d ed. 1978) [hereinafter cited as F. ELKOURI & E. ELKOURI].

³⁵ *See, e.g.,* Davey, *The Supreme Court and Arbitration: The Musings of An Arbitrator*, 36 NOTRE DAME LAWYER 138 (1960-61).

Arbitrators, being human, cannot fail to be impressed with the respect which the Court manifests for the superior knowledge, ability and wisdom of arbitrators. This deference to the specialized knowledge of arbitrators, which the Court feels apparently cannot be equaled by the "ablest judge," is certainly most gracious. At the risk of appearing ungrateful and traitorous to the arbitration profession, I shall venture the observation that such unstinted praise is in many cases probably not deserved — most employers and unions in my acquaintance do not want arbitrators to function in the "philosopher king"

A brief survey of the manner in which arbitrators are called upon by the parties may serve to illustrate the unrealistic nature of our highest Court's estimation of arbitral abilities and experience and, for that matter, what both labor and management expect from labor arbitrators. Labor arbitration in the United States is conducted on either an *ad hoc* or permanent basis,³⁶ depending upon the industries involved.³⁷ An *ad hoc* arbitrator is so termed because he is normally mandated by the parties to hear and determine only the subject-matter of the instant dispute referred to him,³⁸ with no guarantee that his services will be called upon for the resolution of differences in the future between the concerned interests.³⁹ Most of the arbitration workload in this country is performed on an *ad hoc* basis⁴⁰ because of its several advantages. These include: the ability to change arbitrators as disputes arise;⁴¹ leaving the union and employer free to re-select or reject particular arbitrators as they deem appropriate; the ability to call upon arbitrators with specialist qualifications for specific disputes;⁴² and obvious savings in arbitration costs as they are called upon only when differences require determination,⁴³ with no retainer fee involved.⁴⁴ Given these perspectives it is easy to appreciate that arbitrators selected for *ad hoc* purposes can hardly be thought of as bringing to bear upon their determinations an *experience*⁴⁵ and competence that the "ablest judge"

manner suggested by the Court's statement.

On the contrary, most employers and unions choose arbitrators who will go strictly by the *statute law* of their relationship (i.e. the contract) and not by the so-called common law of the shop which might in fact turn out to be nothing more than the arbitrator's personal view as to what would be "good" for the parties. The writer has arbitrated many cases where he felt the subjective considerations referred to in the Court's dictum, such as heightening or reducing tensions in the shop, called for one decision and the contract itself for another. In such cases most parties expect the arbitrator to follow the contract and to eschew the temptation to become a statesman. (Emphasis as in original.)

Id. at 140.

³⁶ A. SLOANE & F. WITNEY, *LABOR RELATIONS* 239-40 (3d ed. 1977) [hereinafter cited as A. SLOANE & F. WITNEY].

³⁷ R. HELFGOTT, *LABOR ECONOMICS* 154 (2d ed. 1980).

³⁸ R. COULSON, *LABOR ARBITRATION - WHAT YOU NEED TO KNOW* 53 (1973) [hereinafter cited as R. COULSON].

³⁹ Although the option is, of course, left open to the parties to retain those *ad hoc* arbitrators whose performance proves satisfactory, see F. ELKOURI & E. ELKOURI, *supra* note 34, at 69.

⁴⁰ W. HOLLEY & K. JENNINGS, *THE LABOR RELATIONS PROCESS* 278 (1980) [hereinafter cited as W. HOLLEY & K. JENNINGS].

⁴¹ A. SLOANE & F. WITNEY, *supra* note 36, at 239.

⁴² F. ELKOURI & E. ELKOURI, *supra* note 34, at 70.

⁴³ M. STONE, *LABOR-MANAGEMENT CONTRACTS AT WORK* 2 (1961) [hereinafter cited as M. STONE].

⁴⁴ This is an important consideration in inflationary times, although, as the Federal Mediation and Conciliation Service reported, arbitration costs have lagged behind the rate of inflation, see 1978 LAB. REL. Y. B. (BNA) 347.

⁴⁵ Professor Getman has commented:

It is difficult to explain how arbitrators generally can lay claim to special knowledge about industrial relations. Most arbitrators do not have prior management experience, and they are most unlikely to have been union officials. They rarely have experience working at the jobs about which they are deciding. Indeed, the selection process discourages people with practical experience in labor relations, since anyone identified with one side is likely to be unacceptable to the other.

cannot share.⁴⁶

A permanent arbitrator is one selected by both the union and the employer to hear and determine disputes arising under their agreement.⁴⁷ His appointment is for a specified time or the duration of the contract,⁴⁸ or sometimes at the pleasure of the parties.⁴⁹ There are many advantages in using the services of this type of arbitrator. Once he is chosen, labor and management are spared the harrowing and time-consuming problem of selection as each dispute arises,⁵⁰ unlike collective bargaining relationships which require only *ad hoc* arbitration. Also, advanced selection permits a careful and unhurried consideration of his qualifications and credentials.⁵¹ Further, as he becomes familiar with the circumstances surrounding the particular collective bargaining relationship,⁵² the permanent arbitrator, or umpire or impartial chairman, as such figures are variously called, will be in a position to eliminate much unnecessary investigative detail and opinion preparation, thus shortening the time required for hearings and thereby reducing costs.⁵³ The use of this form of the arbitration process, in some industries,⁵⁴ since the turn of the century testifies to its considerable advantages where a mature relationship between labor and management is involved.⁵⁵ Unlike the *ad hoc* arbitrator, a permanent arbitrator is in a position to display and develop a considerable body of knowledge about labor relations in the industry where he holds tenure.⁵⁶ He will become familiar not only with the terms of the applicable collective agreement, but also the body of custom and practice concerned,⁵⁷ to the extent that he is indeed versed in the "common law" of his particular industry.⁵⁸ His tenure in office will generally be marked by the consistency of his awards⁵⁹ since the disputes referred to him will all be under the same contract; they will thus be available as a form of precedent to guide the parties in administering their collective agreement⁶⁰ and in the negotiation of future contracts.⁶¹ The perma-

Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L. J. 916, 930 (1978-79) [hereinafter cited as Getman].

⁴⁶ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

⁴⁷ R. COULSON, *supra* note 38, at 69.

⁴⁸ H. DAVEY, *CONTEMPORARY COLLECTIVE BARGAINING* 174-75 (3d ed. 1972).

⁴⁹ *Id.* at 175.

⁵⁰ F. ELKOURI & E. ELKOURI, *supra* note 34, at 74.

⁵¹ *Id.* at 74.

⁵² W. MAGGIOLO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* 4-5 (1971).

⁵³ F. ELKOURI & E. ELKOURI, *supra* note 34, at 75.

⁵⁴ *Id.* at 73.

⁵⁵ For an interesting survey of the differing forms of permanent arbitration systems and the collective relationships behind them, see Killingsworth & Wallen, *Constraint and Variety in Arbitration Systems*, 1964 PROC. OF THE SEVENTEENTH ANN. MEETING, NAT'L ACAD. OF ARB., 56.

⁵⁶ W. HOLLEY & K. JENNINGS, *supra* note 40, at 277.

⁵⁷ A. SLOANE & F. WITNEY, *supra* note 36, at 240.

⁵⁸ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

⁵⁹ F. ELKOURI & E. ELKOURI, *supra* note 34, at 374-77.

⁶⁰ M. TROTТА, *HANDLING GRIEVANCES - A GUIDE FOR MANAGEMENT AND LABOR* 134-35 (1976) [hereinafter cited as TROTТА].

⁶¹ E. BEAL, E. WICKERSHAM & P. KIENAST, *THE PRACTICE OF COLLECTIVE BARGAINING* 418 (5th ed. 1976) [hereinafter cited as E. BEAL, E. WICKERSHAM & P. KIENAST].

nent arbitrator is therefore closer to the Supreme Court's vision of arbitral competence than is the *ad hoc* arbitrator; but again it must be stressed that most arbitration in this country is conducted on an *ad hoc* basis.⁶²

For the vast majority of labor arbitrators, then, a question mark hangs over their competence. A random sample conducted by this writer of 100 arbitrators who currently list their biographies⁶³ reveals that 43 percent are academicians,⁶⁴ 38 percent are lawyers,⁶⁵ and the remainder come from sundry backgrounds, including judges, accountants, economists, and ministers;⁶⁶ and this survey is consistent with earlier studies.⁶⁷ Interestingly, 64 percent of those listed had law degrees,⁶⁸ indicating perhaps that unions and employers hold this particular credential in high esteem, although it is not a decisive factor as shown by the fact that of the majority occupation listed—education—only 10 percent were law professors.⁶⁹ The academic background of many arbitrators points to the inescapable fact that they are not particularly experienced in the realities of labor relations but rather in their particular disciplines. When a professor, for example, is called upon to arbitrate on an *ad hoc* basis in many different industries,⁷⁰ how can he possibly acquire other than a passing acquaintanceship with the array of customs and practices to which he is exposed.⁷¹ He does not know these customs and practices by *experience*, but instead he is usually referred to them in much the same manner that a judge takes judicial notice, indeed to such an extent that this aspect of the arbitrator's function is often termed "arbitral notice."⁷² The legal credentials possessed by so many arbitrators would seem to indicate that unions and employers consider legal acumen more important than knowledge of background custom and practice,⁷³ if indeed they consider this alleged back-

⁶² M. STONE, *supra* note 43, at 2.

⁶³ LAB. ARB. AWARDS (CCH) 9501-9806 *passim* (1981).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., Hepburn and Loiseaux, *The Nature of the Arbitration Process*, 10 VAND. L. REV. 657-660 (1957). See also Herrick, *Profile of a Labor Arbitrator*, ARB. J. JUNE, 1982, at 18.

⁶⁸ See *supra* note 63.

⁶⁹ *Id.*

⁷⁰ "Academic experience or work as a neutral party . . . is common, but these backgrounds do not provide knowledge of the day-to-day realities of labor relations." Getman, *supra* note 45, at 930.

⁷¹ It is likely that an arbitrator will often be faced with problems involving custom and practice. For example:

If the contract provisions and facts in evidence are unmistakably clear and concise, the arbitrator will have little difficulty making a decision. The award will sustain the party whose position is supported by the facts and precise contract language. However, the majority of grievances that are arbitrated do not involve such clear issues, because cases which are so easily defined are usually settled through the grievance procedure. . . . [W]here there is no precise and applicable contract language, the arbitrator is bound to use the past practice of the parties' experience with the collective bargaining agreement as the basis for making a determination. (emphasis supplied).

L. BALLIET, *SURVEY OF LABOR RELATIONS* 160 (1981).

⁷² F. ELKOURI & E. ELKOURI, *supra* note 34, at 361.

⁷³ P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 58 (1966).

ground knowledge at all in their deliberations leading to the selection of an arbitrator. In summary, the means by which labor arbitrators earn their livelihoods⁷⁴ tell us little about their competence in arbitration; they merely indicate that arbitrators are generally drawn from the ranks of competent people, which is not quite the same thing.⁷⁵

The means by which unions and employers select arbitrators provides an interesting perspective on the question of competence. The parties are free to choose whomever they please⁷⁶ as labor arbitration in this country is undertaken on a purely voluntary basis,⁷⁷ but they generally make their choice from lists of arbitrators submitted to them by either the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), a state agency charged with this function,⁷⁸ or from any other source provided in the applicable collective agreement.⁷⁹ These agencies maintain panels of arbitrators who have been rigorously vetted⁸⁰ to ensure the best possible choice to the parties; while this does not necessarily mean that those so empanelled will all be competent arbitrators it at least raises the probability that this will be so because all empanelled are competent people.⁸¹ When in receipt of a list of arbitrators from a designated source, labor and management will make a mutually acceptable choice by striking off names⁸² until they find one that both sides are comfortable with.⁸³

Although there exists a large pool of candidates⁸⁴ who are apparently qualified to hear and determine disputes, a small number of arbitrators get a disproportionately large amount of the workload available. This is so because the most important criterion in selecting an arbitrator, as the parties see it, seems

Insofar as labor arbitration becomes procedurally more formal there may be a tendency to prefer legally qualified arbitrators over others.

If past arbitrations are to be used as precedents, the parties to a case must be given the chance to present relevant decisions to the arbitrator. This can best be achieved by writing briefs, which in turn is made easier by having transcripts made of the hearing. *The use of briefs and transcripts tends to make the hearing more formal; it also tends to increase the selection of lawyers as arbitrators.* (Emphasis supplied.)

Getman, *supra* note 45, at 921.

⁷⁴ For an excellent current analysis of the qualifications and competence of labor arbitrators, see Herrick, *Profile of a Labor Arbitrator*, *ARB. J.*, June, 1982, at 18.

⁷⁵ *Id.* at 21.

⁷⁶ FLEMING, *supra* note 7, at 209-10.

⁷⁷ There is, however, statutory encouragement to enter into voluntary methods of adjustments. See Labor Management Relations Act (Taft-Hartley) § 203(d), 29 U.S.C. § 173(d) (1976).

⁷⁸ S. KAGEL, *ANATOMY OF A LABOR ARBITRATION* 31 (1961).

⁷⁹ C. UPDEGRAFF & W. MCCOY, *ARBITRATION OF LABOR DISPUTES* 66-69 (1961) [hereinafter cited as L. UPDEGRAFF & W. MCCOY].

⁸⁰ D. ROTHSCHILD, L. MERRIFIELD & H. EDWARDS, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 219-20 (2d ed. 1979).

⁸¹ See *supra* note 67.

⁸² TROTTA, *supra* note 60, at 132.

⁸³ R. COULSON, *supra* note 38, at 32.

⁸⁴ The AAA was reported as having a 1500-person panel, with only around 450-500 actually getting cases; while the FMCS reported that 25% of its panel members got 75% of the workload; see *Report by FMCS, AAA on Arbitration Panels*, *LABOR RELATIONS YEARBOOK* (BNA) 225-26 (1967).

to be experience in the arbitration process,⁸⁵ thus creating what one authority called the "catch-22"⁸⁶ of labor arbitration; that is, while there is a shortage of experienced arbitrators,⁸⁷ the inexperienced will not be chosen until they get experience, something the instant parties all too often seem unwilling to give them.⁸⁸ This marked reluctance by unions and employers to introduce "new blood" into the system has resulted in some predictable inequities. It was estimated that in 1969, for example, 75 percent of the available number of arbitration cases were heard by only 25 percent of empanelled arbitrators;⁸⁹ the parties sometimes even going so far as to blacklist certain arbitrators that they were dissatisfied with.⁹⁰ Even on a regional basis the picture remains the same. In California, for example, over 90 percent of the available caseload was heard by only 25 percent of those empanelled.⁹¹

In 1977 the director of the FMCS stated that the pre-experience requirement ensured that while arbitrators under the age of 40 comprised 12 percent of the roster maintained by his agency they received only 3½ percent of the workload.⁹² This discernable age bias can be understood in terms of experience as the parties would be less than human if they lacked apprehension in entrusting their problems to inexperienced and untried arbitrators.⁹³ However, another important factor which contributes to the problem is that of low exposure of new talent.⁹⁴ There is, for example, no modern equivalent of the War Labor Board to give unions and employers a chance to consider the feasibility of using more arbitrators from the larger pool of competent people available.⁹⁵ While many authoritative voices have bemoaned the shortage of skilled arbitrators,⁹⁶ others have stated the problem in terms of an unwillingness on the

⁸⁵ *Study on Criteria in Choosing Arbitrators*, 1978 LAB. REL. Y. B. (BNA) 239-40 [hereinafter cited as *Study*].

⁸⁶ Greenbaum, *Should Arbitrators Be Certified?* 1977 PROC. OF THE THIRTIETH ANN. MEETING NAT'L ACAD. OF ARB., 202, 219 (1977).

⁸⁷ *FMCS Annual Report on Arbitration, Mediation Activity*, 1971 LAB. REL. Y. B. (BNA) 283.

⁸⁸ *Study*, *supra* note 85, at 240.

⁸⁹ *Cost, Time, Training Factors in Labor Arbitration*, 1969 LAB. REL. Y. B. (BNA) 267.

⁹⁰ *Id.* at 270.

⁹¹ *Meeting of Committee on Labor Arbitration*, 1978 LAB. REL. Y. B. (BNA) 125 [hereinafter cited as *Meetings*].

⁹² *FMCS and Problem of New Arbitrators* 1977 LAB. REL. Y. B. (BNA) 125.

⁹³ The parties are also usually unwilling to select some arbitrators who have experience; if it is the wrong kind of experience; see H. DAVEY, *supra* note 15.

The supply shortage will be a problem for employers and unions for some time to come. The parties are always looking for new faces - or say they are - but they exhibit uniform reluctance to pioneer in the trial use of comparatively young and inexperienced arbitrators. They also rarely accept experienced labor relations prospects as arbitrators if the experience of the would-be arbitrator was gained on either the management or the union side of the bargaining table.

This is understandable, regrettable and, in my view, short-sighted.

Id. at 181.

⁹⁴ Teple, *1976 Report of Committee on Development of Arbitrators*, 1976 PROC. OF THE TWENTY-NINTH ANN. MEETING NAT'L ACAD. OF ARB. 327, 329.

⁹⁵ Larney, *Arbitration: The Long and Winding Road*, SPIDR NEWS, June, 1982, at 5.

See also, Seitz, *So You Want To Be An Arbitrator*, 27 ARB. J. 179, 182 (1972).

⁹⁶ See, e.g., Davey, *Restructuring Grievance Arbitration Procedures: Some Modest Proposals*,

part of labor and management to depart from the tried and true,⁹⁷ which makes the problem then not one of shortage but rather of under-utilization of an ample fund of talent.⁹⁸ Concerned arbitrators have for some time been engaged in exercises to bring new faces to the attention of the parties. Internships, for example, have been used by some permanent arbitrators⁹⁹ in an attempt to introduce inexperienced arbitrators to unions and employers in the industries concerned. In regard to *ad hoc* arbitrators, the AAA, FMCS, and others have been instrumental in mounting several novel and ambitious training programs,¹⁰⁰ but without any marked degree of success.¹⁰¹ Empanellment of arbitrators is one thing; actual utilization of their services is another. Clearly, many are called but few are chosen. The unfortunate consequence of this phenomenon is that arbitral competence is relegated to second place in favor of arbitrator *acceptability*; and the refusal by labor and management to broaden their search for arbitrators means that the increased probability of discovering more skilled and able people for determination of the growing number of contractual disputes¹⁰² in this country is thereby diminished.

Sometimes the parties further exacerbate the problem by engaging in "box-scoring." This is a process whereby labor and management undertake a survey of a number of prior awards of a given arbitrator in the hope of finding a bias in favor of union or employer,¹⁰³ depending upon which side is doing the "scoring."¹⁰⁴ Ethical considerations aside, however, there is a basic fallacy in this crude method of selecting an arbitrator. Simply totalling whether or not an arbitrator has found in favor of management or labor over a given number of prior awards does not in and of itself necessarily reveal a bias. As the vast majority of arbitral awards arise from *ad hoc* arbitration,¹⁰⁵ it follows logically that they were decided against differing contractual backgrounds and customary practices,¹⁰⁶ much more so than the hurried and cursory box-score can ever

54 IOWA L. REV. 560, 561 (1969).

⁹⁷ Proposals for Handling Arbitration Problems, 1971 LAB. REL. Y. B. (BNA) 149.

⁹⁸ Meetings, *supra* note 91, at 48.

⁹⁹ FMCS Arbitration Services Advisory Committee, 1976 LAB. REL. Y. B. (BNA) 413.

¹⁰⁰ For an excellent treatment of such endeavors, see McDermott, *Progress Report: Programs Directed At The Development of New Arbitrators*, 1973 PROC. OF THE TWENTY-SIXTH ANN. MEETING NAT'L ACAD. OF ARB. 247-59.

¹⁰¹ Arbitrators may obtain training from a number of sources, but the problem essentially is one of acceptability; see *Reform of Grievance - Arbitration Procedures*, 1972 LAB. REL. Y. B. (BNA) 161.

¹⁰² By 1971 it was estimated that the arbitration caseload was approaching 50,000 cases per year; see *Arbitration, the Courts, the Consequences*, 1971 LAB. REL. Y. B. (BNA) 72. By 1968 the FMCS found that its arbitration workload had doubled in only six years, see *Report on FMCS Mediation, Arbitration in Fiscal 1968*, 1969 LAB. REL. Y. B. (BNA) 675, and its workload has increased every year since, see, e.g., *Government's Role in Bargaining, Labor Disputes*, 1977 LAB. REL. Y. B. (BNA) 356. *Government's Role In Bargaining, Labor Disputes*, 1979 LAB. REL. Y. B. (BNA) 374.

¹⁰³ E. BEAL, E. WICKERSHAM, & P. KIENAST, *supra* note 61, at 415.

¹⁰⁴ H. DAVEY, *supra* note 48, at 167-68.

¹⁰⁵ W. HOLLEY & K. JENNINGS, *supra* note 40.

¹⁰⁶ M. STONE, *supra* note 43, at 288.

reveal.¹⁰⁷ As *prior* awards are involved, it must further be stressed that such methods may serve to militate against selecting arbitrators who already have experience, thereby diminishing a pool of available competence which is already too small. While the labor arbitration community at large finds that most arbitrators are not influenced by box-scoring,¹⁰⁸ it undoubtedly provides a none too subtle pressure, whatever the response to it of each arbitrator, to sway decisions on the basis of past awards to the extent that the literature of labor arbitration sometimes contains allegations of favoritism to one side or another,¹⁰⁹ and of "splitting" awards between unions and employers in the hope of demonstrating an apparent objectivity.¹¹⁰ As labor arbitration is an adversarial process,¹¹¹ the manifest desire to win is perhaps understandable on the part of both parties, but it seems trite and contradictory for unions and employers using such methods of selection to demand lists of arbitrators selected for empanelling, among other factors, on the basis of their impartiality and integrity.¹¹² Where box-scoring is used, the prestige of arbitral competence is accordingly debased to such a degree that the president of the AAA has likened this method of selection to choosing a race horse on which to bet.¹¹³

Judge Paul R. Hays is probably the most famous critic of the labor arbitration process and of the competence of labor arbitrators. His trenchant criticism¹¹⁴ is accorded more respect and consideration than most because he was himself a labor arbitrator of some years standing.¹¹⁵ He stated that the Supreme Court had no basis in fact for assuming that arbitrators had a knowledge of the realities of collective bargaining superior to that of judges,¹¹⁶ its rationale coming at a time when little labor arbitration literature was available.¹¹⁷ He noted that judges could be informed of the customs and practices

¹⁰⁷ *Formula for Winning Labor Arbitration Cases*, 1967 LAB. REL. Y. B. (BNA) 65.

"The numbers game and a search of the won-lost record is purposeless. The essential consideration is the intelligence, integrity, and experience of the arbitrator."

¹⁰⁸ Davey, *How Arbitrators Decide Cases*, 27 ARB. J. 274, 282-83 (1972).

¹⁰⁹ See, e.g., Eaton, *Labor Arbitration in the San Francisco Bay Area*, 22 ARB. J. 93, 95 (1967). See also Kleiman, *The Impact of Acceptability On The Arbitrator*, PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARB. 112, 115 (1968).

¹¹⁰ Killingsworth, *Twenty-Five Years of Labor Arbitration - And The Future*, 1972 PROC. OF THE TWENTY-FIFTH ANN. MEETING NAT'L ACAD. OF ARB., 11, 14 (1972) [HEREINAFTER CITED AS KILLINGSWORTH]. See also Cole, *The Status and Expendability Of The Labor Arbitrator*, 1957 SELECTED PAPERS FROM THE FIRST SEVEN ANN. MEETINGS OF THE NAT'L ACAD. OF ARB. 1948-1954, 42, 48.

¹¹¹ For an entertaining and instructive treatment of this feature of the arbitration process, see Gill, *Gamesmanship In Labor Arbitration*, 1962 PROC. OF THE FIFTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 148. See also Garrett, *The Role of Lawyers In Arbitration*, 1961 PROC. OF THE FOURTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 102, 106-107 [hereinafter cited as Garrett].

¹¹² Ryder, *The Impact of Acceptability On The Arbitrator*, 1968 PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARB. 94, 98-100.

¹¹³ Coulson, *Criticisms of Grievance Arbitration*, 1980 LAB. REL. Y. B. (BNA) 137, 139.

¹¹⁴ P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* (1966) [hereinafter cited as P. HAYS].

¹¹⁵ Judge Hays was formerly a member of the law faculty of Columbia University. He was an arbitrator for twenty-three years before joining the federal bench in 1961.

¹¹⁶ P. HAYS, *supra* note 114, at 38.

¹¹⁷ There is a surprising lack of factual studies of the arbitration process. Yet if we are to understand what the system really is and how it actually works in practice such studies

that lie behind the wording of a collective agreement in the same way that arbitrators are, namely by being told of them.¹¹⁸ Observing that the Court's generous allocation of jurisdiction upon labor arbitrators seemed to be predicated on the basis of their superior skills, he again emphasized that there were no extensive studies in this area to support this contention.¹¹⁹ He claimed that if there were any identifiable skills necessary for arbitrators they were legal ones,¹²⁰ and compared the expertise required of labor arbitrators to that of a judge deciding a case in contract law;¹²¹ going on to say of the typical arbitrator:

For his task he requires exactly the same expertise which judges have and use every day. He must be expert in analyzing issues, in weighing evidence, and in contract interpretation.

There are only a handful of arbitrators who . . . have the knowledge, training, skill, and character to make them good judges and therefore good arbitrators. In literally thousands of cases every year, decisions are made by arbitrators who are wholly unfitted for their jobs—who do not have the requisite knowledge, training, skill, intelligence, and character.¹²²

Judge Hays drove home his charges by alleging that an indeterminate number of arbitral awards were made each year by arbitrators who were primarily motivated by a desire to be rehired by the parties.¹²³ While admitting that the number so decided could not be quantitatively estimated, he nonetheless claimed that a system which gives rise to this is *per se* undesirable.¹²⁴

The labor arbitration community, as was to be expected, issued many rebuttals to this biting criticism of the learned Judge, some of them quite thoughtful and considered.¹²⁵ Leaving aside his assertions concerning the sta-

are vital. . . . For whatever reason, there are few studies of the arbitration process written by its clients. Our knowledge of the subject would be considerably enhanced by frank and thoughtful studies of this kind.

Id.

¹¹⁸ *Id.* at 47-48.

¹¹⁹ [T]here is no authority to support the view of arbitration adopted in the Steelworkers cases. There have been no extensive studies of the arbitration process that would establish the validity of the propositions advanced in those cases. While, with overwhelming modesty, the Court attributed to the arbitrators enormously superior expertise in cases arising under collective agreements, the Court impliedly claimed for itself an extensive knowledge and understanding of the arbitration process - a knowledge and understanding which the Court could hardly have in the light of the available material on arbitration.

Id. at 9.

¹²⁰ *Id.* at 58.

¹²¹ *Id.* at 42.

¹²² *Id.* at 112.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Meltzer, *Ruminations About Ideology, Law, And Labor Arbitration*, 1967 PROC. OF THE TWENTIETH ANN. MEETING NAT'L ACAD. OF ARB. 1. "His [Hays'] charges generally suffer from a painful lack of documentation, and when he reaches for evidence, his methods are distorted by a passion for denunciation. In short, he has substituted for the Supreme Court's mythology of arbitral excellence a new mythology of arbitral corruption and incompetence." *Id.* at 2. See also Aaron, Book Review, 42 WASH. L. REV. 976 (1966-67). (Professor Aaron's view of Judge Hays' book).

tus of labor arbitration and the alleged venality of some arbitrators, however, his comments concerning the expertise necessary for a labor arbitrator to successfully determine disputed contractual claims by labor and management are instructive. Most practitioners and many authoritative commentators¹²⁶ would probably agree that the skills required of an arbitrator are judicial in nature,¹²⁷ and in fact, some members of the judiciary have found similarities between the contract interpretation techniques demanded of an arbitrator and those employed by judges,¹²⁸ noting also the growth and development in arbitration procedures of other legal concepts familiar to the judiciary; for example, considerations of due process.¹²⁹ Given these estimations of the skills required of a labor arbitrator it would therefore seem appropriate to cautiously contend that, as so many arbitrators are in possession of legal credentials,¹³⁰ they are probably largely competent to undertake the task of determining capably the disputes referred to them in the grievance arbitration system.¹³¹

Whether or not the Supreme Court's initial appraisal of arbitrator performance was accurate, it did lead to judicial deferral to the awards of labor arbitrators; and indeed it was understood by arbitration scholars as being more of a conferral of jurisdiction upon arbitrators than a correct summary of their skills.¹³² Thus a party which is dissatisfied with an award will not be able to obtain judicial review of it except on very specific grounds.¹³³ In *Alexander v. Gardner-Denver Co.*,¹³⁴ the Supreme Court refused to defer to a prior arbitral award because a possible breach of Title VII was also involved. In so doing, however, the Court noted that the specialized competence of labor arbitrators lay in the law of the shop as opposed to the law of the land.¹³⁵ While the Supreme Court in the 1960 *Steelworkers' Trilogy* was seeking to confer jurisdiction upon labor arbitrators, the *Gardner-Denver* Court in 1974 was seeking

The flaws of the system upon which he delights to dwell - incompetent and corrupt arbitrators; collusive arrangements between labor and management designed to hoodwink innocent workers; excessive delays; outrageous costs - are individually and collectively so reprehensible that one is compelled to wonder how professor-arbitrator Hays permitted himself to participate actively in this sordid process for twenty-three years.

Id. at 976-77.

¹²⁶ Most of these persons while castigating his views of the process and of arbitrators, do not dispute the assessment of Judge Hays concerning the nature of the skills required in determining grievance disputes.

¹²⁷ Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L. J. 605, 606 (1959). See also Garrett, *supra* note 111, at 114-115.

¹²⁸ See, e.g., Tobriner, *An Appellate Judge's View Of The Labor Arbitration Process; Due Process And The Arbitration Process*, 1967 PROC. OF THE TWENTIETH ANN. MEETING NAT'L ACAD. OF ARB. 37 [hereinafter cited as Torbriner].

¹²⁹ *Id.* at 41-45.

¹³⁰ See *supra* note 63.

¹³¹ Tobriner, *supra* note 128, at 46.

¹³² Aaron, *Arbitration In The Federal Courts: Aftermath Of the Trilogy*, 1962 PROC. OF THE FIFTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 60, 61-62.

¹³³ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

See also Rothstein, *Vacation of Awards for Fraud, Bias, Misconduct and Partiality*, 10 VAND. L. REV. 813 (1956-57).

¹³⁴ 415 U.S. 36 (1974).

¹³⁵ *Id.* at 57.

to restrict it. But both rationales contained utterances concerning the specialized competence of labor arbitrators; the difference with the *Gardner-Denver* pronouncement being that it came after a long period of time during which much study and research into labor arbitration had been undertaken.

The years since the *Steelworkers' Trilogy* have indeed witnessed a vast increase in the total knowledge available concerning labor arbitration. A large number of awards are published annually,¹³⁶ for the guidance of all involved in the system;¹³⁷ or in studying it. Each year, also, the most prestigious professional body in the field—the National Academy of Arbitrators—holds its Annual Convention during which some of the leading figures in arbitration present papers on various aspects of the process; these and other contributions are accordingly published as Proceedings of the National Academy, making them available to the entire arbitration community.¹³⁸ Bodies such as the AAA and the FMCS additionally contribute many publications¹³⁹ and much important research has been conducted in the area.¹⁴⁰ Add to all of this the work of arbitration scholars¹⁴¹ and it can be readily appreciated that there exists in the United States a considerable body of knowledge about labor arbitration. While competence in the field does not of itself make an arbitrator acceptable to the parties, the extensive growth and development of arbitration research and literature does mean that those selected to determine contract administration

¹³⁶ These awards are published by organizations such as the Bureau of National Affairs (BNA) and the Commerce Clearing House (CCH).

¹³⁷ Not all awards are published; in fact only a small percentage appear in print. See Alexander, *Evaluation Of Arbitrators: An Arbitrator's Point of View*, 1958 PROCEEDINGS OF THE ELEVENTH ANN. MEETING NAT'L ACAD. OF ARB. 93, 97.

¹³⁸ The Academy was founded in 1948 and it has held annual conventions since then, the proceedings of which are published by the Bureau of National Affairs (BNA).

¹³⁹ The AAA has, for example, since 1959 published a monthly summary of Labor Arbitration Awards.

¹⁴⁰ See, e.g., Warren & Bernstein, *A Profile of Labor Arbitration*, 16 LAB. ARB. (BNA) 970 (1951); *Procedural Aspects of Labor-Management Arbitration*, 28 LAB. ARB. (BNA) 933 (1957); *Basic Patterns in Labor Arbitration Agreements*, 34 LAB. ARB. (BNA) 931 (1961); Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. 141 (1970); Rosser, *Deference of Jurisdiction by the National Labor Relations Board and the Arbitration Clause*, 25 VAND. L. REV. 1057 (1972); Jennings & Wolters, *Discharge Cases Reconsidered*, 31 ARB. J. 164 (1976); Gross & Bordoni, *Reflections On The Arbitrator's Responsibility To Provide A Full And Fair Hearing: How to Bite The Hands That Feed You*, 29 SYRACUSE L. REV. 877 (1978); Lawson, *Arbitrator Acceptability: Factors Affecting Selection*, 36(4) ARB. J. 22 (1981); Fogel, *Court Review of Discharge Arbitration Awards*, 37(2) ARB. J. 22 (1982). The foregoing is offered as an indication of the extent and diversity of labor arbitration scholarship in dealing with various aspects of the labor arbitration process and some of the challenges with which it has been presented from time to time.

¹⁴¹ The work of arbitration scholars has indeed increased in extent and quality since the time of the *Steelworker's Trilogy*, but Professor Aaron, in his critique of Judge Hays claimed that there was, in fact, a large body of arbitration literature prior to the *Steelworkers*, saying:

Judge Hays appears not to have made even the most cursory review of the literature of labor arbitration. Descriptive and statistical studies, as well as critical articles, abound, and some of the most outspoken attacks on both the system of labor arbitration and on arbitrators themselves by their 'clients' have been published in the Annual Proceedings of the National Academy of Arbitrators.

Aaron, Book Review, 42 WASH. L. REV. 976, 978 (1966-67).

disputes have a definable body of arbitration lore to call upon;¹⁴² certainly much more than in 1960 when the *Steelworkers' Trilogy* gave labor arbitration its prestigious place in American collective bargaining. While it may be debatable whether arbitrators have knowledge and experience which a judge does not possess of the realities of collective bargaining, it is probably true to say that they now have specialized competence in the subject matter of labor arbitration which a judge is unlikely to possess.

II. THE LABOR ARBITRATION PROCESS

In *Gardner-Denver* the Supreme Court expressed a certain caution in relation to the total system wherein arbitrators exercise their professional skills; its opinion being that the informal nature of labor arbitration militated against the rigor deemed necessary for adequate protection of minority rights in the employment relationship.¹⁴³ In noting that an employee does not waive Title VII rights merely by resorting to arbitration,¹⁴⁴ the Court went on to state that these rights could not be waived prospectively.¹⁴⁵ Rejection of such a waiver was based on the premise that collective bargaining rights were markedly different from the individual rights protected under the Title. Collective bargaining rights, for example, even those conferred by statute,¹⁴⁶ could be either adhered to by the union in its capacity as collective bargaining agent or relinquished as part of the bargaining process in order to obtain benefits for its members.¹⁴⁷ The Court was seeking to ensure that Title VII rights could not be waived as part of a process of bargaining which had as its objective the furtherance of majority rights as opposed to the purely individual ones protected by the Title.¹⁴⁸ The election of remedies doctrine was found inapplicable as the rights conferred under the collective agreement and those conferred under Title VII were from two different sources.¹⁴⁹ An increasing number of collective agreements have provisions prohibiting employment discrimination,¹⁵⁰ which

¹⁴² See Killingsworth, *supra* note 110.

Over the past quarter-century, we have amassed a substantial body of literature in our field. There is unevenness and there are still gaps, but the body of industrial jurisprudence continues to grow and even to change. Given the relatively brief time-span involved it is a remarkable collective achievement. This body of literature, articulating commonly accepted principles, now supports our claim to the status of a profession.

Id. at 20.

See also Houghton, *Future Directions For Labor Arbitration And For The National Academy of Arbitrators*, 1977 PROC. OF THE THIRTIETH ANN. MEETING NAT'L ACAD. OF ARB. 243, 256-57.

¹⁴³ *Gardner-Denver*, 415 U.S. at 56-58.

¹⁴⁴ *Id.* at 52.

¹⁴⁵ *Id.* at 51.

¹⁴⁶ The right to strike, for example, is given by virtue of § 13 of the National Labor Relations Act, 29 U.S.C. § 163(1976), but it can be waived as part of the give and take of bargaining. "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." *Lincoln Mills*, 353 U.S. at 455.

¹⁴⁷ *Gardner-Denver*, 415 U.S. at 51.

¹⁴⁸ "Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities." *Id.*

¹⁴⁹ *Id.* at 49-51.

¹⁵⁰ Coulson, *Black Alice In Gardner - Denverland*, 1974 PROC. OF THE TWENTY-SEVENTH ANN.

would mean that such matters could go to arbitration as a breach of the applicable contract. The Court, however, refused to defer to an arbitral award made even under these circumstances. Its objection was based on the inappropriateness of the arbitration process itself as a means of adjudicating such grievances adequately.¹⁵¹

A brief survey of the nature and mechanics of the labor arbitration process may serve to illustrate the Court's concern with entrusting the important public policy issues involved in Title VII to a forum which is privately established and financed for purposes of grievance adjustment between labor and management.¹⁵² As a means of resolving contractual disputes between unions and employers, arbitration is usually preferred to court enforcement because it is widely regarded as being faster, less expensive, and less formal than the legal process.¹⁵³ But the informality of arbitration in relation to court procedure was the very feature of the process that the Court found undesirable where minority rights were involved.¹⁵⁴

The parties may initiate arbitration by means of a submission agreement¹⁵⁵ or, more commonly, a demand or notice by either side invoking the applicable arbitration clause of their collective agreement. Once they have selected a qualified and mutually acceptable arbitrator,¹⁵⁶ the person chosen will normally arrange, with the help of the agency which forwarded his name to the parties,¹⁵⁷ a date on which the hearing will be held. At the commencement of the hearing the parties may stipulate the issue to be determined; if they are unable to do so with accuracy, the arbitrator will normally formulate the issue.¹⁵⁸ The arbitrator may then discuss with the parties and their representatives the procedure to be followed. Sometimes this is outlined in the arbitration clause of the contract, or contained in the rules of the administering agency utilized by the union and employer.¹⁵⁹ Where this is not the case, the arbitrator often determines what procedure is to be employed;¹⁶⁰ the Supreme Court itself has stated that procedural questions which arise from a dispute

MEETING NAT'L ACAD. OF ARB. 236, 237.

¹⁵¹ "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." *Gardner-Denver*, 415 U.S. at 56.

¹⁵² Zack, *Suggested New Approaches To Grievance Arbitration*, 1977 PROC. OF THE THIRTIETH ANN. MEETING NAT'L ACAD. OF ARB. 105, 106.

¹⁵³ Feinsinger, *Collective Bargaining, Labor Arbitration And The Lawyer*, 10 VAND. L. REV. 761, 767 (1956-57).

¹⁵⁴ "Indeed it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." *Gardner-Denver*, 415 U.S. at 58.

¹⁵⁵ C. UPDEGRAFF & W. MCCOY, *supra* note 79, at 84-85.

¹⁵⁶ Friedin, *The Status And Expendability Of The Labor Arbitrator*, 1957 SELECTED PAPERS FROM THE FIRST SEVEN ANN. MEETINGS OF THE NAT'L ACAD. OF ARB. 42, 51-52.

¹⁵⁷ C. UPDEGRAFF & W. MCCOY, *supra* note 79.

¹⁵⁸ F. ELKOURI & E. ELKOURI, *supra* note 34, at 188-90.

¹⁵⁹ See R. COULSON, *supra* note 38, at 97-104.

¹⁶⁰ F. ELKOURI & E. ELKOURI, *supra* note 34, at 182.

and bear on its final disposition are matters for the arbitrator.¹⁶¹

There is no set order of presentation in labor arbitration. The arbitrator's discretion being paramount in this respect, he is charged usually with ensuring that the order of presentation is such that the facts of the case can be developed in an orderly manner.¹⁶² The charging party will often make the opening statement, to be followed by the opening statement of the defending party.¹⁶³ Each side may then produce evidence and witnesses, and cross-examination will be permitted.¹⁶⁴ At the close of the hearing, each side will be given the opportunity to make concluding statements and they may produce briefs for submission to the arbitrator summarizing their respective positions and their principal arguments, buttressed sometimes by supporting prior arbitral awards.¹⁶⁵ The parties then await what will hopefully be a prompt compilation of the arbitrator's award in the near future, although there is increasing complaint of the tardiness of some arbitrators in this important respect.¹⁶⁶ Theoretically an arbitrator is not required to give an opinion with his award,¹⁶⁷ but in practice the parties often require this in order to obtain the reasoning on which the award is based, for purposes of guidance in the event of similar disputes occurring in the future and as a benchmark for the amendment of the wording of their collective agreement when contract negotiations come around next.¹⁶⁸ The foregoing is an attempt to describe a typical arbitration session. Actual practice may vary from one set of circumstances to another, but even this cautious summary may serve to show the importance of arbitrator competence in two important respects which may prove crucial in the resolution of a grievance arbitration dispute, namely, the procedure adopted and the order of presentation.

The arbitrator's essential task is to balance fairness to the parties with the requirements of procedural efficiency.¹⁶⁹ The delicacy with which this responsibility must be handled is best illustrated by describing evidence admission in arbitration. Admission is at the discretion of the arbitrator but it is generally understood that he will admit all relevant evidence and weigh it "for what it is worth."¹⁷⁰ To the consternation of the trained lawyer, this extends even to hearsay and affidavit evidence.¹⁷¹ The basic differences in function of an arbi-

¹⁶¹ John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

¹⁶² Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV., 733, 739 (1956-57) [hereinafter cited as Aaron].

¹⁶³ Id. at 739.

¹⁶⁴ Id. at 745.

¹⁶⁵ W. HOLLEY & K. JENNINGS, *supra* note 40, at 281, 289.

¹⁶⁶ FMCS Arbitration Services Advisory Committee Meeting. 1976 LAB. REL. Y. B. (BNA) 412 (1976). See also Killingsworth, *supra* note 110, at 24.

¹⁶⁷ United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

¹⁶⁸ E. BEAL, E. WICKERSHAM, & P. KIENAST, *supra* note 61, at 418.

¹⁶⁹ Fleming, *Problems of Procedural Regularity in Labor Arbitration*, 1961 WASH. U.L.Q. 221.

¹⁷⁰ Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments*, 62 MICH. L. REV. 1115, 1127-30 (1963-64).

¹⁷¹ Straus, *Labor Arbitration and Its Critics*, 20 ARB. J. Journal, 197 (1965):

'I'll Accept it For What it is Worth.' If there is one expression on the part of an arbitrator best calculated to get an attorney's supply of milltown out on the table, this is it.

tration tribunal and a court of law make the less rigorous stance of the arbitrator comprehensible. There is no jury in labor arbitration, and the need for caution in the admission of evidence is therefore not as great as in a court of law.¹⁷² In addition, an arbitral award may be subsequently overthrown by a court on grounds of failure to hear material evidence;¹⁷³ but requiring arbitrators to be expert in, for example, the complexities of the hearsay rule¹⁷⁴ would mean that a layman could not adequately conduct an arbitration hearing. The Supreme Court also noted that arbitration may have a therapeutic effect on the parties involved,¹⁷⁵ and arbitrators generally interpret this to mean that they should give the union and management representatives the opportunity to get things off their chest,¹⁷⁶ even when it includes material and testimony which would not be permitted in a court of law. It is not hard to appreciate that the relaxed stance of labor arbitrators in this regard would probably prove disturbing to an employee alleging employment discrimination as well as a breach of the collective agreement.

The difficulty involved in ascertaining to what degree a particular arbitrator adhered to, or detracted from, the rules of evidence is further exacerbated by the fact that in most arbitration proceedings an adequate record is not kept. Sometimes a written transcript will be used and sometimes the proceedings will be tape recorded.¹⁷⁷ Written transcripts are not employed in the majority of arbitration hearings,¹⁷⁸ but their use is on the increase.¹⁷⁹ They may prove useful in long and complicated proceedings, and are often undertaken where the subject matter is highly technical. Arbitrators are sometimes partial

Many attorneys, trained as they are for the formal rules to be found in the courts, find traumatic the informality and permissiveness of the arbitration hearing room. Even some of the most experienced advocates from the ranks of both labor and management feel unhappy when an arbitrator agrees to accept certain kinds of evidence which a court of law might reject as irrelevant.

Id. at 202.

¹⁷² M. SCHEINMAN, *EVIDENCE & PROOF IN ARBITRATION* 6-7 (1977).

¹⁷³ *Id.* at 7.

¹⁷⁴ See generally, MCCORMICK ON EVIDENCE (2d ed. 1972).

¹⁷⁵ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

¹⁷⁶ DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARB. 125, 127 (1968).

Consider the time-honored stance of the late Dean Shulman. The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out.

Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1017 (1955).

¹⁷⁷ For a succinct account of the ways in which an arbitration proceeding may be recorded, see Jaffee, *Battle Report: The Problem of Stenographic Records in Arbitration*, 20 ARB. J. 97 (1965) [hereinafter cited as Jaffee].

¹⁷⁸ *Labor Arbitration-Perspectives And Problems*, 1964 PROC. OF THE SEVENTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 82, 96.

¹⁷⁹ See, e.g., 1981 34TH ANN. REP. FED. MEDIATION AND CONCILIATION SER. 38, Table 18:

Cases closed	Transcripts taken	Not taken	Other
1977 5,729 (100%)	1,365 (23.8%)	4,130 (72.1%)	234 (4.1%)
1981 6,967 (100%)	2,044 (29.3%)	4,610 (66.2%)	313 (4.5%)

to them because they eliminate the need for much unnecessary note taking, thereby permitting better concentration on the facts and issues presented,¹⁸⁰ and they may be instrumental in salvaging an award in the event of subsequent court review.¹⁸¹ Where written transcripts are undertaken they sometimes tend to make the parties exercise more care in the presentation of evidence and testimony because of the verbatim and permanent nature of this method of recording the proceedings.¹⁸² On first inspection, then, the utilization of a transcript would seem to go some way to meeting the Supreme Court's requirement of an adequate record of the proceedings,¹⁸³ and the increase in their use would seem encouraging to proponents of Title VII protections. However, labor arbitration commentators do not welcome this increase and it is often criticized on several grounds. Written transcripts are said, for example, to bring an unwelcome delay in the rendering of an award because an arbitrator will have to devote time to reading it, and the parties involved may be lured into unnecessary rhetoric and formality.¹⁸⁴ Thus the relative informality on which labor arbitration is based tends to militate against meeting even this most rudimentary of the *Gardner-Denver* requirements for according weight to an arbitral award.

The informal nature of labor arbitration proceedings would seem, on first inspection, to make the task of the arbitrator a relatively easy one. Closer analysis, however, indicates that this basic feature of the process places instead a crucial responsibility upon arbitrators to dispatch their function competently. Unaided by the sophisticated techniques of the courtroom he must somehow provide a full and fair hearing in a process that, if skill and vigilance were not exercised, could conceivably degenerate into anarchy.¹⁸⁵ Much depends upon the ability with which the arbitrator handles the competing interests involved. He can make sense (or alternatively nonsense) out of the proceedings at such crucial points as defining the issue or issues before him,¹⁸⁶ establishing the pro-

¹⁸⁰ *The Arbitrator, the NLRB, and the Courts*, 1967 PROC. OF THE TWENTIETH ANN. MEETING NAT'L ACAD. OF ARB. 331, 332.

¹⁸¹ Jaffee, *supra* note 177, at 98.

¹⁸² Roberts, *How To Get Better Results From Labor-Management Arbitration*, 22 ARB. J. 1, 4 (1967) [hereinafter cited as Roberts].

¹⁸³ *Gardner-Denver*, 415 U.S. at 57, 60.

¹⁸⁴ However, in the run-of-the mill case, economy and efficiency are not served by having a transcript. With a transcript being taken, there is a tendency to use it as an opportunity for rhetoric. On occasion it appears that the speaker is addressing some other audience that may be looking over his shoulder. These aberrations tend to prolong the hearing. The stenographic record also encourages an unnecessary formality which consciously or unconsciously is a reaction to the knowledge that what is being said will appear later in printed form. It may change the entire personality of the hearing.

Finally, there is a delay in receiving the record and in the submission of any briefs. The award similarly will be delayed.

Roberts, *supra* note 182 at 4, 5.

¹⁸⁵ For an instructive treatment of this crucial function of the arbitrator see Jaffee, *The Arbitration Hearing - Avoiding A Shambles: A Panel Discussion*, 1965 PROC. OF THE EIGHTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 75.

¹⁸⁶ F. ELKOURI & E. ELKOURI, *supra* note 158.

cedure to be followed,¹⁸⁷ and controlling the order of presentation of the evidence and testimony proffered. In this respect his overall task has been described as one of building into the proceedings an "ordered informality."¹⁸⁸

An illustration of the interpersonal or human relations skills which this requires is provided by what is sometimes termed the "political" arbitration case; that is, there is no compelling question of contract interpretation involved but one or other of the parties wants its day in court if only to save face.¹⁸⁹ In these circumstances an arbitrator who insisted on strict construction of the applicable contract would be contributing to poor industrial relations in the company or undertaking concerned.¹⁹⁰

While maintaining informality an arbitrator must nevertheless be in control of the hearing. Critics of the process sometimes blame arbitrators for relinquishing the necessary control to the parties or their representatives.¹⁹¹ Where, for example, the union and employer use attorneys to represent them,¹⁹² informality may be severely strained, especially where the arbitrator is not a lawyer himself. It is perhaps understandable that a lawyer, when faced with the seemingly amorphous nature of arbitration proceedings, may be tempted to rely on tried and true courtroom techniques to bring order out of apparent chaos, and the fact that some overstep the mark in this respect is attested to by the mounting criticism of lawyers as bringing an undesirable legalism into the process.¹⁹³ Even when the services of an attorney are not used, the parties themselves may tax the skills of an arbitrator by behaving in a legalistic way¹⁹⁴ or

¹⁸⁷ Wirtz, *Due Process of Arbitration*, 1958 PROC. OF THE ELEVENTH ANN. MEETING NAT'L ACAD. OF ARB. 1, 34-34.

¹⁸⁸ Jaffee, *supra* note 185, at 82. See also Aaron, *supra* note 162. "It does not follow, however, that because the arbitration procedure is informal, it must also be anarchic or disorderly. Certain practices, based on common sense and simple courtesy, are observed in most cases." *Id.* at 748.

¹⁸⁹ Eaton, *Labor Arbitration In The San Francisco Bay Area*, 22 Arb. J. 93, 95 (1967).

¹⁹⁰ Many of the comments upon the arbitration process appear to assume a judicial model. Take, in particular, the remarks concerning "face-saving" cases. Even those who approve of their use often do so with reluctance. In some way this kind of case does not square with the concept of what a proper hearing should be, and what other than the judicial trial can furnish the standard which is violated? This is an excellent example of problems which can arise when the collective bargaining process is crossed with the judicial process. The resultant beast is neither, and difficulties appear when we try to apply standards from one or the other to the new animal. While there are many guidelines in arbitration hearings, there are also many areas of discretion, and the final responsibility for adjusting the business rests in only one place, upon the arbitrator.

Id. at 111-12.

For an interesting discussion of whether an arbitrator should be an "adjudicator" or a "labor relations physician", see Fuller, *Collective Bargaining And The Arbitrator*, 1962 PROC. OF THE FIFTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 8.

¹⁹¹ Jaffee, *It's Your Money! Cutting the Cost of Labor Arbitration*, 26 Arb. J. 161, 169 (1971).

¹⁹² See Garrett, *supra* note 111.

¹⁹³ See, e.g., *Subversion of Arbitration by Legalistic Approach*, 1979 LAB. REL. Y. B. (BNA) 115-16.

¹⁹⁴ Aaron, *Labor Arbitration And Its Critics*, 10 Lab. L. J. 605 (1959).

[N]o one is so legalistic as a layman imitating a lawyer. Some of the wildest irrelevancies, most frustrating procedural roadblocks or detours and most patently unfounded objections I have ever encountered in an arbitration proceeding were prefaced by the fateful

indulging in a form of gamesmanship¹⁹⁵ to win their case. The continued popularity of labor arbitration would seem to illustrate that, at least in the perceptions of unions and employers, the typical arbitrator is competent at blending the minimal legal techniques required to bring some order into the proceedings while preserving the informality which the parties theoretically demand with the human relations skills necessary to maintain control of the hearing.

In the collective bargaining process, the parties usually conclude their negotiations with an agreement which establishes the terms of their relationship for a period of definite duration, ranging from one to three years.¹⁹⁶ Collective bargaining may therefore be considered as a method whereby the union and employer establish rules and regulations which arise from joint determination of the basis of their working relationship.¹⁹⁷ When an employee alleges a breach of the end product of this means of joint determination (i.e., the collective agreement) it may be taken by the union all the way through a grievance procedure to arbitration. But while the individual worker concerned may be claiming that the action complained of was a violation by the company of an obligation owed to the worker personally, his ground of action, and also his right to process it, arises from the individual application of a *collective* provision in the contract.¹⁹⁸ The terms of a collective agreement are rarely considered by the parties to be cast in stone. In the mature collective situation, the parties normally conceive their relationship as being fluid and dynamic in nature.¹⁹⁹ Behind the strict wording of the terms of their collective agreement may lie a considerable background of custom and practice²⁰⁰ which could make a purely legal application of collective provisions unworkable in the real world

words: Of course, Mr. Arbitrator, I'm not a lawyer, but. . . .

Id. at 607.

¹⁹⁵ See Gill, *supra* note 111.

¹⁹⁶ *Trend Toward the Three Year Bargain*, 1969 LAB. REL. Y. B. (BNA) 81-82.

¹⁹⁷ There are many good working definitions of the term "collective bargaining." This writer prefers that of Professor Hugh Clegg in *THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN* (1972).

It is widely supposed that in the early days of industrialization factories, mines, railways and offices were run by autocratic managers whose word was a law. This is generally called *employer regulation*. When a union (or unions) establishes a foothold some of the rules may be made by agreement between manager and unions, with joint arrangements for revision and interpretation. This is called *collective bargaining*, or sometimes bilateral or joint regulation in contrast to the unilateral regulation of managers acting on their own. (emphasis as in original).

Id. at 1.

¹⁹⁸ *J. I. Case Co. v. National Labor Relations Bd.*, 321 U.S. 332 (1944).

We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages.

Id. at 338.

¹⁹⁹ M. ESTEY, *THE UNIONS*, 73-74 (1967).

²⁰⁰ Mittenthal, *Past Practice And The Administration of Collective Bargaining Agreements*, 1961 PROC. OF THE FOURTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 30, 37.

of labor relations.²⁰¹ In the absence of an arbitration clause in their contract, one party could compel the appearance of the other in a court under the bare wording of section 301(a) of the Taft-Hartley Act.²⁰² However, resort to legal action in a court must eventually produce a winner and a loser; and while the contestants before a legal tribunal may never meet again, the participants in the collective bargaining process must get together the very next day in the working environment.²⁰³

In place of involuntary compulsion, many unions and employers have opted instead for their own form of self-government, the grievance adjustment system which concludes in voluntary and binding arbitration.²⁰⁴ Although the traditional legal techniques and procedures are accordingly only available in a minimal form before the arbitration tribunal, the parties submit their disputes to it in order to preserve the essentially flexible nature of their collective relationship. As they are thereby attempting to avoid the strict legal application of their contractual provisions, the parties, whether expressly or impliedly, are placing a premium on informality. The individual appearing before an arbitrator is therefore not accorded the benefits of the traditional protections available in a court of law, but most unions can perhaps justifiably claim an expertise in processing a grievance which has its origins in a term of the collective agreement,²⁰⁵ having the necessary experience and resources to do so.²⁰⁶ This is not necessarily a comfort to the employee who also alleges employment discrimination, as the competence of a union, even with benefit of an attorney,

²⁰¹ Wallen, *The Silent Contract vs. Express Working Conditions: The Arbitration of Local Working Conditions*, PROC. OF THE FIFTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 117, 121. The use of past practice to clarify what is ambiguous and to give substance to a contract's generalities is too commonplace to require discussion. The norms of conduct laid down by the parties themselves are employed to establish their intent under contract language that can be read several ways or that is vague or unclear because it is broadly written. The presence or absence of a past practice clause would scarcely serve to alter the use of past practice for this purpose.

²⁰² Labor Management Relations Act (Taft-Hartley) § 301(a), 29 USC § 185(a) (1976).

²⁰³ Aaron, *On First Looking Into The Lincoln Mills Decision*, 1959 PROC. OF THE TWELFTH ANN. MEETING NAT'L ACAD. OF ARB. 1, 13. Educating the courts in the philosophy of arbitration and passing laws to prevent them from interfering unduly in its process has become necessary only to the extent that some employers and unions have traded their priceless opportunity to govern themselves under private laws of their own making for the illusory advantages of winning an occasional argument by resorting to litigation.

²⁰⁴ G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 134 (9th ed. 1981). The grievance procedure is in fact more than a process which provides for the peaceful settlement of disputes arising out of contract interpretations. It is also a mechanism through which misunderstandings can be straightened out and problems solved. It permits representatives of management and labor to meet regularly and to obtain greater understanding of each other's problems.

²⁰⁵ *Id.* at 138-39. Grievances are important to the union leadership—they afford an opportunity to gain the workers' loyalty and support by effectively arguing workers' causes with management in the many disputes which are processed through the grievance machinery. Furthermore, operation of the grievance machinery provides opportunities for thousands of workers to serve as union stewards and committeepersons and thus to gain familiarity with the process of collective bargaining. Several hundred thousand union members now serve in these minor positions. By participating in the grievance machinery, these workers are training themselves for future union leadership.

²⁰⁶ W. HOLLEY & K. JENNINGS, *supra* note 40, at 262.

lies in defending advances made through the collective bargaining process, not the law of the land.

A minority employee is therefore more reliant on arbitral competence than the majority of his fellow workers, even given the best intentions of his union; but it is at least questionable whether or not an arbitrator whose experience lies in an essentially informal method of adjudication can provide adequate coverage of Title VII protections.²⁰⁷ There are a number of authoritative labor arbitration commentators who complain of a growing formality and legalism in the process;²⁰⁸ and this places those who advocate a greater role for arbitration in disputes involving discrimination in something of a quandry. If arbitration does in fact become more formal and legalistic there would be a tighter logical argument for according a greater weight, and perhaps deference, to the award of an arbitrator who determines a breach of a collective agreement which also prohibits discrimination. But increasing formality is not welcomed by the arbitration community; it is instead the subject of much criticism,²⁰⁹ and suggestions for its containment are frequently advanced.²¹⁰ It is therefore appropriate

²⁰⁷ [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Gardner-Denver, 415 U.S. at 51.

²⁰⁸ *Creeping Legalism In Labor Arbitration: An Editorial*, 13 *ARB. J.* 129 (1958); Ross, *The Role Of The Law In Arbitration*, 1959 *PROC. OF THE TWELTH ANN. MEETING NAT'L ACAD. OF ARB.* 68. Some of the traditional values of the process: the relatively speedy and economical procedure, the avoidance of dilatory maneuvers, the likelihood of substantial justice on the merits—are increasingly being jeopardized. Arbitration is losing some of its creative and inventive character as it settles into a routine. *Id.* at 72. “No one has seriously contended, I believe, that formal legal principles of interpretation ought to govern the construction of a labor contract. In a labor arbitration they would be a needless encumbrance and would probably make no difference in the result.” Fuller, *supra* note 190 at 11.

²⁰⁹ Freidin, *Legal Status of Labor Arbitration*, 1 *N.Y.U. CONF. LAB.* 233 (1948).

Arbitrators should not be legalistic and technical. Their proceedings may be as informal as the parties desire. The purpose of arbitration is to allow parties to have their disputes settled without the formality and legalism of litigation, and to use the experience of men in the trade, with full knowledge of the customs and practices, to judge and determine the questions submitted for decision.

Braden, *Current Problems in Labor-Management Arbitration*, 6 *ARB. J.* 91, 95 (1951). See also Usery, *Appeal for More Efficient Arbitration*, 1973 *LAB. REL. Y.B. (BNA)* 115; *Move to Formality in Arbitration*, 1978 *LAB. REL. Y.B. (BNA)* 80; Veglahn, *Arbitration Costs/Time*, 30 *LAB. L. J.* 49 (1979).

²¹⁰ See, e.g., Davey, *supra* note 96 at 570, where the author notes: “[P]rehearing statements and written submission agreements are clearly aids to a more economical hearing once the latter is under way.” The author also observes that labor and management may make contractual provisions for the elimination of transcripts and posthearing briefs, unless specifically required. *Id.* at 569. Of posthearing briefs, the author states, “In the writer’s own ad hoc experience, prehearing briefs are a rarity whereas post-hearing briefs are becoming increasingly standard practice. This situation should be completely reversed to improve the efficiency of arbitration and make more effective use of the present limited supply of competent, experienced and acceptable arbitrators.” *Id.* at 567.

to raise some fundamental questions concerning the relationship between labor arbitration and employment discrimination. If the traditional mission of a labor arbitrator is to determine disputes under a collective agreement resulting from the flexible process known as collective bargaining, why not confine them entirely to this role? If a dispute arises involving a minority employee, why not remit it to a court for adjudication, thus leaving the arbitration forum for the majority? If the labor arbitration process is in general fraught with so many imperfections, from a Title VII standpoint, why even bother to consider expanding the jurisdiction of an arbitrator to encompass claims of discrimination? What problems lie in seeking accommodations between the traditional function of labor arbitration and the increasingly complex area of employment discrimination, and in what manner would arbitrators have to evince special competence if such accommodations were made? These questions, and related matters, will be considered in part III of this Article.

III. PROBLEMS OF ACCOMMODATION

Prior to the *Gardner-Denver* decision, the Supreme Court appeared to strengthen the presumption of arbitrability in relevant collective agreements even where considerations of external law existed. In *Gateway Coal Co. v. United Mine Workers*,²¹¹ the Court found, *inter alia*, that an agreement to submit disputes to arbitration required deferral even where a question of safety under section 502 of the Taft-Hartley Act existed.²¹² It also seemed at first that some lower courts would extend a similar deferral to arbitration where Title VII rights were involved. Thus in *Dewey v. Reynolds Metals Co.*,²¹³ the Sixth Circuit held that an arbitrator could finally dispose of an alleged civil rights violation where the parties had agreed to submit the dispute to final and binding arbitration.²¹⁴ The affirmation of *Dewey* by a divided Supreme Court²¹⁵ caused some circuits to search for appropriate deferral standards. The most sophisticated came from the Fifth Circuit in *Rios v. Reynolds Metals Co.*,²¹⁶ where it was found that an arbitral award could be upheld in the face of an alleged Title VII violation where certain stringent criteria were met.²¹⁷ The

²¹¹ 414 U.S. 368 (1973).

²¹² *Id.* at 385-87. Section 502 provides, in pertinent part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." Labor Management Relations Act (Taft-Hartley) § 502, 29 U.S.C. § 143 (1976) (*quoted in* 414 U.S. at 385).

²¹³ 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971).

²¹⁴ 429 F.2d at 332.

²¹⁵ 402 U.S. 689 (1971).

²¹⁶ 467 F.2d 54 (5th Cir. 1972).

²¹⁷ First, there may be no deference to the decisions of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual

Rios deferral standards were addressed primarily to the procedures of the arbitration process and not specifically to the expertise of the arbitrator, although given their rigor, the existence of a high degree of arbitral competence could be necessarily implied. The Supreme Court, however, rejected the applicability of a *Rios* style deferral, observing that effective enforcement of Title VII rights by way of arbitration would make the arbitration forum "a procedurally complex, expensive, and time-consuming process."²¹⁸ The Court noted further that, given the inappropriateness of arbitration in the protection of Title VII rights, an employee might well resort to legal enforcement rather than arbitration if deferral was permitted, reducing the possibility of voluntary compliance or settlement of claims under the Title.²¹⁹ The Court was therefore not ruling out arbitration in this regard; an employee could still use the arbitration forum in the hope of obtaining a settlement of that aspect of his claim which involved employment discrimination,²²⁰ but if this proved unsuccessful, resort to a lawsuit was still available.²²¹ In the same way that the Court which decided the *Steelworkers' Trilogy* was concerned with seeking to prevent massive resort to litigation under section 301 of Taft-Hartley,²²² the *Gardner-Denver* Court was attempting to curb the potentially large number of lawsuits which a total rejection of the use of the arbitration forum for resolving Title VII claims would have involved.²²³

The collective bargaining system itself, and the grievance adjustment process which it gives rise to, poses some difficult problems for minority employ-

issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

Id. at 58.

²¹⁸ *Gardner-Denver*, 415 U.S. at 39.

²¹⁹ A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

Id. at 59.

²²⁰ *Id.* at 52.

²²¹ We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*.

Id. at 59-60.

²²² W. OBERER, K. HANSLOWE & J. ANDERSEN, *LABOR LAW—COLLECTIVE BARGAINING IN A FREE SOCIETY* 672-73 (2d ed. 1979).

²²³ The availability of multiple forums, however, does not mean that justice is necessarily being served. In too many cases, the individual does not know of the alternatives, and even if action is filed, the current backlog of cases may prevent justice. The prime example is the Equal Employment Opportunity Commission (EEOC). During its first year of operation, it had a backlog of 8,000 cases. By 1976, this had increased to over 150,000 cases, thus causing many charges to be in investigation for years with the result being fading of memories and unavailability of records. The effect of this is that many charges are never resolved.

Rubinfeld & Strouble, *Arbitration and EEO Issues*, 30 *LAB. L.J.* 489 (1979).

ees. The negotiation and administration of a collective agreement requires an often delicate balancing with the rights and interests of the majority of the workforce against those of a minority which may consider itself adversely affected; and this may be so even when no question of employment discrimination is involved.²²⁴ Differences in treatment of this kind are permissible under the law when they are reasonably related to the objectives of the collective agreement.²²⁵ A union is permitted to engage in this form of discrimination provided its conduct complies with what has been observed to be its duty of fair representation. The earliest judicial ruling on this duty concerned an instance of blatant racial discrimination. In *Steele v. Louisville & Nashville R.R.*,²²⁶ the Supreme Court was confronted with a situation in which a union negotiated a collective agreement which clearly discriminated against black employees.²²⁷ The Court found that the right of the union to represent employees in a designated unit under the Railway Labor Act of 1926²²⁸ required the union to observe a correlative obligation to represent all employees fairly, not simply white employees.²²⁹ The concept of fair representation was extended to the administration of a collective agreement in *Vaca v. Sipes*,²³⁰ where the Supreme Court held that an employee does not have an absolute right to require the processing of a grievance all the way to arbitration; the union being free to select, in its capacity as sole bargaining agent, claims which it deemed worth pursuing from those which it considered without merit, provided that it did so in a manner which was not "arbitrary, discriminatory, or in bad faith."²³¹ The Supreme Court dealt with the status of an arbitral award where the duty of fair representation had been breached in *Hines v. Anchor Freight Inc.*,²³² where it found that the failure of a union to act in accordance with this standard was grounds for overturning the finality bar of arbitration.²³³

The existence of a duty of fair representation does little to assuage the

²²⁴ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

²²⁵ *Id.* at 338.

²²⁶ 323 U.S. 192 (1944).

²²⁷ *Id.* at 195-96.

²²⁸ 41 Stat. 456.

²²⁹ While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority . . . Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty.

323 U.S. at 202.

²³⁰ 386 U.S. 171 (1967).

²³¹ *Id.* at 190.

²³² 424 U.S. 554 (1976).

²³³ The grievance process cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the Union has been dishonest, in bad faith or discriminatory; for in that event error and injustice of the grossest sort would multiply.

Id. at 571. See Note, *Finality and Fair Representation*, 34 WASH. & LEE L. REV. 309 (1977).

fears of those concerned with the effectuation of Title VII protections. As it is based on a union's collective bargaining and contract administration function, it necessarily involves majoritarian processes rather than protection of individual rights. The individual worker must be fairly and impartially represented on the basis of the collectively agreed terms of the contract, not on the provisions of the Title. Obviously, where a minority employee's access to arbitration was denied on grounds which violated Title VII, a breach of the duty of fair representation could also be established.²³⁴ But in general the burden of proof in a duty of fair representation action is a heavy one,²³⁵ and in the view of some, it is too great for effective enforcement of Title VII rights.²³⁶ A growing number of collective agreements have clauses prohibiting employment discrimination, but again, Title VII protection might fall by the wayside as a union exercises its right to accept or reject a grievance for processing to arbitration on grounds that accord with the objects of the contract, which may or may not be congruent with the claim of the aggrieved minority employee.²³⁷ Remitting the grievances of minority employees to a separate procedure than that applicable to the rest of the workforce would seem a practical alternative to the prevalent system of unitary grievance adjustment, but as one authority has noted,²³⁸ the maintenance of separate procedures would in itself most likely be a breach of the duty of fair representation as well as a violation of Title VII.²³⁹

Arbitrators have sometimes dealt with employment discrimination claims in the normal course of contract interpretation by applying a standard of "just cause" in discipline and discharge cases.²⁴⁰ Collective agreements usually contain this particular limitation on what would otherwise be considered an unrestricted right of management,²⁴¹ but where this is not provided for expressly in a contract, arbitrators will often imply its existence.²⁴² However, given the best intentions, the ingenuity of labor arbitrators is not enough to cope with

²³⁴ Hill, *The Union's Duty To Process Discrimination Claims*, ARB. J., Sept. 1977, 180, 183 (1977).

²³⁵ But the burden on employees will remain a substantial one, far too heavy in the opinion of some. To prevail against either the company or the union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. As the district court indicated, this involves more than demonstrating mere errors in judgment.

Anchor Freight, 424 U.S. at 570-71.

²³⁶ See Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 24 ARB. J. 197, 201 (1969).

²³⁷ Glanstein, *Arbitration of EEO Issues: A Dissenting View*, 1980 32d N.Y.U. Conf. Lab. 155, 163-64.

²³⁸ Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. CHI. L. REV. 724 (1976).

²³⁹ *Id.* at 734.

²⁴⁰ Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination In Employment*, 24 ARB. J. 88, 90-92 (1969).

²⁴¹ For an excellent theoretical treatment of management rights see Killingsworth, *The Presidential Address: Management Rights Revisited*, 1969 PROC. OF THE TWENTY-SECOND ANN. MEETING NAT'L ACAD. OF ARB. 1.

²⁴² Fleming, *The Labor Arbitration Process: 1943-1963*, 1964 PROC. OF THE SEVENTEENTH ANN. MEETING NAT'L ACAD. OF ARB. 33, 46. See also Killingsworth & Wallen, *Constraint And Variety In Arbitration Systems*, at 78-79.

the problems of processing a grievance involving Title VII matters because of the nature of the overall system in which they operate. Assuming that a minority employee has successfully surmounted the difficult obstacles presented by the duty of fair representation, an arbitrator is mandated to determine grievance disputes under the terms of a collective agreement. It is generally agreed that an arbitrator should not import his personal standards of equity and fairness where these would conflict with the express or implied provisions of the contract.²⁴³ Arbitrators would, of course, be less than human if they did not unconsciously infer their own notions of justice into a disputed matter from time to time, but even if they were given express permission to do so (in practice an unlikely proposition) this would in and of itself be too flimsy a basis for adequately disposing of minority claims under the collective agreement.²⁴⁴

Where considerations of external law exist alongside questions of interpretation of collectively agreed terms, arbitration scholars are divided on the extent to which the law should be taken into account by a labor arbitrator.²⁴⁵ The terms of a collective agreement may require that an arbitrator consider applicable areas of law, or they may restrict his ability to do so.²⁴⁶ It is felt that an arbitrator, where not required to examine anything but the relevant contractual clauses, should not require conduct forbidden by the law in his award, even though he may permit it.²⁴⁷ The general position is that an arbitrator may consider all relevant areas, including external law, for guidance in the compilation of his award;²⁴⁸ the debate in the arbitration community centers upon whether or not he should do so.²⁴⁹ Even assuming an affirmative response to

²⁴³ F. ELKOURI & E. ELKOURI, *supra* note 34, at 320. See also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

²⁴⁴ "Even the remedies in arbitration leave something to be desired. They may be limited by the particular collective agreement or the arbitrator clothed with unlimited discretion to fashion remedies may be reluctant to utilize an injunction or other affirmative action sought in Title VII Claims." Glanstein, *supra* note 237, at 166.

²⁴⁵ For a treatment of the main arbitral tendencies on the relationship between labor arbitration and external law see Mittenthal, *The Role of Law In Arbitration*, 1968 PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARB. 42.

²⁴⁶ Meltzer, *Ruminations About Ideology, Law, And Arbitration*, 1967 PROC. OF THE TWENTY-ETH ANN. MEETING NAT'L ACAD. OF ARB. 1, 23.

²⁴⁷ "Although the arbitrator's award may permit conduct forbidden by law but sanctioned by contract, it should not require conduct forbidden by law even though sanctioned by contract." (Emphasis as in original). Mittenthal, *The Role of Law In Arbitration*, *supra* note 245, at 50. See also Cox, *The Place Of Law In Labor Arbitration*, 1957 SELECTED PAPERS FROM THE FIRST SEVEN ANN. MEETINGS OF THE NAT'L ACAD. OF ARB. 1948-1954, 76. "The principle requires only that the arbitrator look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance." *Id.* at 79.

²⁴⁸ Cox, *Reflections Upon Labor Arbitration In The Light Of The Lincoln Mills Case*, PROC. OF THE TWELTH ANN. MEETING NAT'L ACAD. OF ARB. 24. "The governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings and aspirations of the going industrial concern. The arbitrator is not bound by conventional law, although he may follow it." *Id.* at 46.

²⁴⁹ See Meltzer, *supra* note 246.

One such question is how the just-cause standard should be applied and the applicable burden of persuasion defined where a grievant's employment . . . involves substantial risk to the public and to fellow employees and where regulation imposes duties on em-

this inquiry, the question then becomes one of whether or not arbitrators are in fact competent to do so. After the *Gardner-Denver* decision there were many calls for the training of arbitrators in the requirements of employment discrimination law,²⁵⁰ some even advocating certification of those wishing to determine Title VII matters.²⁵¹ Conflicting viewpoints appeared in the labor arbitration literature; some alleging that arbitrators could, with sufficient training, handle adequately the task of applying Title VII principles to grievances before them;²⁵² others alleging that they did not have the necessary expertise to do so.²⁵³ There was no doubt whatsoever in the mind of Professor Meltzer when he observed: "But it is with respect to precisely these [Title VII] questions that arbitrators lack any special competence."²⁵⁴

Professor Harry Edwards initially took a similar stance.²⁵⁵ His apprehen-

ployers that reflect the risks involved. In such situations there is no necessary incompatibility between the contractual standard and that drawn from regulation or public policy; for the contractual standard is formulated loosely, presumably for the purpose of permitting consideration of all relevant factors, including, of course, the relevant regulation or public policy. Similarly, where a contractual provision is susceptible to two interpretations, one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant factor for interpretation. Arbitral interpretation of agreements, like judicial interpretation of statutes, should seek to avoid a construction that would be invalid under a higher law.

Id. at 15.

Further, Professor Meltzer notes:

If the parties in their submission made it clear that they wanted an advisory opinion, so to speak, on what the law permitted, I might give them an advisory opinion. But I think I would make it clear to them, formally and informally, that the opinion was only advisory, that they could not expect an official tribunal to give that kind of award the same deference that is granted to an award grounded in the agreement.

Meltzer, *supra* note 246, at 31.

²⁵⁰ See, e.g., Webster, *Arbitrating Title VII Disputes: A Proposal*, ARB. J., March 1978, 25, 28.

²⁵¹ For an instructive treatment of the certification question see Coulson, *Certification And Training Of Labor Arbitrators: Should Arbitrators Be Certified?* 1977 PROC. OF THE THIRTIETH ANN. MEETING NAT'L ACAD. OF ARB. 173.

²⁵² See, e.g., Blumrosen, *Individual Worker-Employer Arbitration Under Title VII*, 31 N.Y.U. CONF. LAB. 329, 338-39 (1978).

²⁵³ See, e.g., Robinson & Neal, *Arbitration And Discrimination*, 1976 PROC. OF THE TWENTY-NINTH ANN. MEETING NAT'L ACAD. OF ARB. 20, 42.

²⁵⁴ Meltzer, *supra* note 238, at 732.

²⁵⁵ The misgivings of Professor Edwards concerning the adequacy of the arbitration process and the ability of arbitrators to cope with the requirements of employment discriminations law were demonstrated in his thoughtful paper.

The evidence as to whether and how many arbitrators are professionally competent to decide legal issues in cases involving claims of employment discrimination is at best mixed. Furthermore, even assuming, arguendo, that most arbitrators are professionally competent to decide such issues, the nature of the arbitration process often will not allow for full and adequate consideration of an employee's Title VII rights. Finally, the evidence from the survey suggests that even when arbitrators are professionally competent to decide legal issues and when the arbitration process is adequate to allow for full consideration of legal questions arising pursuant to Title VII, still many arbitrators believe that they have no business interpreting or applying a public statute in a contractual grievance dispute. . . . Arbitrators, unlike judges, are accountable only to the parties and their decisions are rarely subject to judicial review. The simple fact is that arbitrators are not responsible for developing principles of public law. . . . Therefore, even if

sion about using contractual procedures to resolve Title VII disputes being based on the conclusion that most collective agreements were constructed on the principles of good collective bargaining and not the requirements of external law.²⁵⁶ Collectively agreed provisions incorporating a prohibition against discrimination did little to ease his misgivings about the ability of arbitrators to cope with employment discrimination matters and he tartly observed: "The arbitrator and the parties must recognize that he is no more qualified to ascertain the law just because the parties say so."²⁵⁷ These highly authoritative voices notwithstanding, the inclusion of antidiscrimination clauses in collective agreements continued to the point where it became perceived as a feature of good industrial relations practice to so incorporate them.²⁵⁸ The use of arbitration to determine grievance disputes involving claims of discrimination could not therefore be brushed aside, as such matters became part and parcel of what was heretofore acknowledged as being within the competence of labor arbitrators—the determination of disputed terms of a collective agreement.²⁵⁹ An additional factor necessitating a fundamental reassessment of the role of arbitration in employment discrimination was the alarming backlog of cases lodged with the Equal Employment Opportunity Commission (EEOC).²⁶⁰ This body started with an ambitious mission but quickly found itself bogged down in the intricacies of enforcement.²⁶¹ As its workload reached staggering propor-

some arbitrators are better qualified than some judges to decide certain issues, this still would not militate in favor of a deferral rule in cases involving claims of employment discrimination.

Edwards, *Arbitration Of Employment Discrimination Cases: An Empirical Study*, 1975 PROC. OF THE TWENTY-EIGHTH ANN. MEETING NAT'L ACAD. of Arbitrators 59, 82-83.

²⁵⁶ Edwards, *Labor Arbitration At The Crossroads: The 'Common Law of the Shop' v. External Law*, ARB. J., June 1971, 65, 86.

²⁵⁷ *Id.* at 79.

²⁵⁸ Coulson, *supra* note 150.

Management and labor are already moving. Most employers have created affirmative compliance programs. As new cases spell out evolving legal obligations, employers scramble into line. . . . All of this provides a new challenge for those of us who encourage contract arbitration. Conflicts between the union contract and job-discrimination laws can be arbitrated. Arbitrators can help employers bring about necessary compliance, with the least possible disruption in the production process. The union will want to participate in this effort.

Id. at 237.

²⁵⁹ "Seemingly, arbitration must now satisfy a new client. Arbitrators have learned to accommodate the needs of labor lawyers, business agents, and personnel directors. When discrimination issues are involved, labor arbitration may have now become a consumer tribunal." *Id.*

²⁶⁰ Siegel, *Arbitration of EEO Issues: A Positive View*, 1980 32 N.Y.U. CONF. LAB. 139, 143 (1980).

I think, by using arbitration, we can reduce the strain on people and the strain on administrative and judicial resources. I also believe that it will allow us to build up the integrity of our systems. . . . Now arbitration is not the panacea, and I immediately point that out. But it does offer what I think is the best hope as the alternative remedy in this field.

Id. at 148.

²⁶¹ For a summary of the first six months of operation of the EEOC see *Equal Employment Opportunity*, 1966 LAB. REL. Y.B. (BNA) 341-61. By 1967 the EEOC was already feeling the pressures and problems generated by its increasing workload. See *Problems of EEOC in Policing Employment Discrimination*, 1967 LAB. REL. Y.B. (BNA) 432-38.

tions,²⁶² one EEOC Commissioner regretfully acknowledged that its policing and enforcement function resembled "all the clout of a feather duster,"²⁶³ and by 1977 a study conducted by the General Accounting Office concluded that the EEOC was "confused, fragmented, and in disarray."²⁶⁴

The intensely practical problems encountered by the EEOC led to a softening of some of the theoretical objections to the use of arbitration. Professor Edwards, for example, while still retaining many of his misgivings about the arbitration process in the effectuation of minority rights, suggested that with suitable safeguards, a modified form of arbitration might prove valuable in easing some of the practical problems of enforcement.²⁶⁵ He proposed the establishment of a "two-track" system under which statutory questions would be eliminated from arbitration,²⁶⁶ only "hybrid" grievances alleging both a breach of the collective agreement and a violation of Title VII would proceed.²⁶⁷

Another interesting attempt at arbitral modification to cope with discrimination claims was provided by the AAA, which constructed a set of model rules²⁶⁸ designed to establish greater confidence by the parties in the use of arbitration to resolve discrimination claims.²⁶⁹ Basically these rules require that the parties consist of the individual employee and the employer, that the individual be represented by a personal attorney, that the Federal Rules of Evidence be used for guidance, and that the arbitrator be selected from a panel composed of persons with a background in employment discrimination law and practice.²⁷⁰ Modifications such as these will require a certain increase in formality,²⁷¹ but this may not lead to greater formalism in the arbitration system

²⁶² It was estimated that by 1974, in terms of caseload, the EEOC was rapidly pushing the National Labor Relations Board into second place. See *Discussion at Discrimination at NYU Conference*, 1974 LAB. REL. Y.B. (BNA) 137, 138. See also Rubinfeld and Strouble, *supra* note 223.

The dilemma concerning the appropriate role for arbitration procedures in the resolution of discrimination complaints is a product of the choice of forums open to the aggrieved party. Besides arbitration, an individual may also file a complaint with the EEOC, other federal regulatory agencies, a federal district court, a state equal opportunity agency or a state court. In most cases, an individual can pursue these actions concurrently or await a decision which, if unfavorable, can be relitigated in a new action.

Id. at 489.

²⁶³ EEOC Commissioner Leach on Improvement, 1976 LAB. REL. Y.B. (BNA) 195.

²⁶⁴ GAO Appraisal of Federal EEO Effort, 1977 LAB. REL. Y.B. (BNA) 351.

²⁶⁵ Edwards, *Arbitration as an Alternative in Equal Employment Disputes* 33 ARB. J. 23 (1978).

²⁶⁶ *Id.* at 24.

²⁶⁷ "In cases that implicate Title VII rights, the two-track system would permit arbitration in only those cases in which the grievance alleges an act that might be considered a violation of both the collective bargaining agreement and of Title VII." *Id.*

²⁶⁸ See Anderson, *Arbitration and the Law: "A Better Way"*, 30 LAB. L.J. 259 (1979). "The procedures are intended to resolve matters concerning statutory rights rather than contractual rights. They may be used in nonunion as well as organized places of employment." *Id.* at 266.

²⁶⁹ Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 ARB. J. 23, 25 (1978).

²⁷⁰ *Id.* at 24-29.

²⁷¹ See Bloch, *Labor Arbitration's Crossroads Revisited: The Role Of The Arbitrator And The Response Of The Courts*, 47 U. CIN. L. REV. 363 (1978).

as a whole, as the persons selected to arbitrate hybrid disputes will not be drawn from the larger panels of organizations such as the AAA and FMCS but rather from small select lists.²⁷² Adaptations such as the foregoing do not also depart very far theoretically from the role of arbitration as a settlement producing mechanism which the *Gardner-Denver* Court envisaged,²⁷³ and all concerned may have strong motivations to use arbitration in this way rather than resort to a lawsuit. The employer may use it to avoid the prospect of relitigation in the federal forum;²⁷⁴ the union may feel it prudent to do so in satisfaction of the demands of the duty of fair representation;²⁷⁵ and the individual employee concerned may use it to avoid the inordinate delay involved in filing with the EEOC, in the knowledge that the way to court remains open in the more complicated cases,²⁷⁶ or even in the simpler cases where the employee remains dissatisfied with the arbitrator's award. Labor arbitration may therefore prove useful in building a climate of opinion in which some of the policy objectives of Title VII will be absorbed into collective bargaining practice and find their ultimate repose as an integral part of the conventional wisdom of industrial relations.²⁷⁷

Ideally, internal grievance machinery should be informal, speedy, inexpensive and responsive to the particular problems of the workplace. Yet, in the final analysis, Edwards' screening criteria merely add another, rather complex step to this process. . . .

Arbitration is the substitute for industrial strife or strikes, and parties must make every imaginable effort to keep the systems procedurally simple. The requirements of due process and the difficult business of talking plainly to one another create a sufficiently arduous task. We need not complicate it further by the prospect of deciding which procedure goes with which grievant, thereby adding an additional level of potential dispute.

Id. at 368.

²⁷² Coulson, *supra* note 269.

In discrimination claims between the individual employees and their employer, a knowledge of the employment discrimination law is important. Arbitrators should also be sensitive to the behavioral subtleties involved in dealing across barriers of sex, race, or ethnic differences, and familiar with employment practices. The arbitrator must not only be capable of reading a fair decision, but must also appear to be fair, both to the individual claimant and to the employer.

The American Arbitration Association has assembled a panel of arbitrators familiar with employment discrimination matters. These people will be included on lists submitted to parties seeking an arbitrator for such cases. It is particularly important that both attorneys have confidence in the arbitrator selected to hear their case. Not only are complicated legal concepts involved, but delicate human prejudices may color an arbitrator's judgment. Mutually acceptable appointments will be more confidently made after parties have had an opportunity to review the performance of the panel members in such discrimination cases.

Id. at 24.

²⁷³ *Gardner-Denver*, 415 U.S. at 55.

²⁷⁴ See Coulson, *Another Seat At The Table: Gardner-Denver 1974*, 27 N.Y.U. CONF. LAB. 201, 210 (1975).

²⁷⁵ Edwards, *supra* note 255, at 66.

²⁷⁶ See Meltzer, *The Impact Of Alexander v. Gardner-Denver On Labor Arbitration*, 27 N.Y.U. CONF. LAB. 189 (1975). "The Court recognized that an arbitrator is competent to deal with . . . overlapping contractual and statutory issues and that his award might finally resolve such issues. But it is an employee's acquiescence in an award adverse to him, not the law that produces finality." *Id.* at 192.

²⁷⁷ See Cohen & Eaby, *The Gardner-Denver Decision and Labor Arbitration* 27 LAB. L.J. 18,

CONCLUSION

Labor arbitrators are generally acknowledged to be in possession of a specialized competence in relation to the traditional function of labor arbitration.²⁷⁸ It remains to be seen whether or not they will achieve a reputation of similar status where the additional perspective of employment discrimination is involved. The future contains an element of hope, however, for several good reasons. Chief among these is the fact that the *Gardner-Denver* Court itself left some room for the labor arbitration community to explore and experiment with various ways of ascertaining what form of contribution the arbitration process might best make in the effectuation of the policy objectives of Title VII.²⁷⁹ Another encouraging factor is that the proponents of labor arbitration have not been lax in seeking to find ways of amending the traditional arbitration process to accommodate the purposes of Title VII.²⁸⁰ The parties themselves further show signs of incorporating protections against employment discrimination as a normal part of the collective bargaining system,²⁸¹ which means that such matters will lead inexorably to arbitration for determination. Last, but by no means least, many arbitrators are actively striving to enlarge their area of competence to include a mastery of employment discrimination law and practice.²⁸²

(1976):

While a number of industrial relations practitioners have argued in favor of abandoning arbitration in discrimination cases, the argument would appear to be premature in view of the Court's suggestion that the awards of arbitrators be given appropriate weight in judicial proceedings. There are, furthermore, distinct advantages to labor arbitration and, over time, these advantages may become as apparent in civil rights disputes as they are elsewhere. The economy and efficiency of arbitration, for example, may prove to be sufficiently attractive so as to assure that arbitration will, in fact, be the final step in many disputes over civil rights at the workplace.

Id. at 23. See also Hill, *The Authority of a Labor Arbitrator to Decide Legal Issues Under a Collective Bargaining Contract: The Situation After Alexander v. Gardner-Denver*, 10 IND. L. REV. 899, 929-30 (1977).

²⁷⁸ Feller, *The Impact Of External Law Upon Labor Arbitration*, THE FUTURE OF LABOR ARBITRATION IN AMERICA 83.

[T]he nature of the decision which the arbitrator makes is one which he is peculiarly competent to make and which the courts are not competent to make. . . . This special competence is the essential premise upon which rests the freedom from review which the courts have granted to labor arbitrators.

Id. at 109. Rock, *The Presidential Address: A "Maintenance of Standards" Clause For Arbitrators*, 1975 PROC. OF THE TWENTY-SEVENTH ANN. MEETING NAT'L ACAD. 1, 8-9.

²⁷⁹ Aksen, *Post-Gardner-Denver Developments In Arbitration Law*, 1975 PROC. OF THE TWENTY-EIGHTH ANN. MEETING NAT'L ACAD. OF ARB. 24. "I submit that there was no reason to articulate Footnote 21 so carefully unless the Court still truly believed in the salutary adjudication process so well known to all members of the NAA and this audience here today." *Id.* at 27.

²⁸⁰ For an evaluation of the main proposals see Bloch, *supra* note 271, at 368-73.

²⁸¹ Newman, *Post-Gardner-Denver Developments In The Arbitration Of Discrimination Claim*, 1975 PROC. OF THE TWENTY-EIGHTH ANN. MEETING NAT'L ACAD. OF ARB. 36, 38-39. See also Coulson, *supra* note 150.

²⁸² For an examination and analysis of the manner in which arbitrators are applying the regulations and principles of employment discrimination in the arbitration process see Oppenheimer & LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, ARB. J., March 1979 12.

While the Supreme Court has accordingly reserved a role for labor arbitration in the resolution of employment discrimination claims, uncertainty still exists in the courts as to what its appropriate function ought to be,²⁸³ an uncertainty whose origins lie in the puzzling Footnote 21 of the *Gardner-Denver* decision.²⁸⁴ It will doubtless be necessary for the Supreme Court to issue a more definitive statement at some time in the future in order to amplify this meager source of authority. Footnote 21 makes it clear that the traditional procedures of arbitration will have to be tightened in order for an arbitrator's award to be ascribed any weight;²⁸⁵ it is not difficult to grasp what the Court meant when it required, for example, an adequate record of the arbitration proceeding. The procedural modifications treated in the latter part of this Article may therefore be instrumental in easing some of the workload of the EEOC, and the courts as the ranks of the dissatisfied are commensurately reduced; and for those who insist on a lawsuit, these modifications may help in achieving an allocation of weight to an arbitral award by a court.

What remains unclear in regard to the criteria of Footnote 21 is the nature of "the special competence of particular arbitrators" which the Court required as a factor in ascribing weight to an award. The skills required of a labor arbitrator for the determination of grievance disputes are basically judicial in nature.²⁸⁶ But another important dimension is worthy of consideration in any assessment of the abilities of arbitrators, namely, responsibility for the conduct of the entire proceedings.²⁸⁷ Unaided by courtroom procedure, he must maintain order and stability in the hearing before he even gets to the exercise of contract interpretation skills and techniques. The ability to maintain both order and informality in the proceedings places a considerable strain upon the arbitrator's expertise, especially where each side has legal representation.²⁸⁸

²⁸³ For an analysis of the factors contributing to this uncertainty see Jacobs, *Confusion Remains Five Years After Alexander v. Gardner-Denver*, 30 LAB. L.J. 623 (1979).

²⁸⁴ The effect of *Gardner-Denver*, in large measure because of this footnote, has been to confuse rather than to clarify the relationship of Title VII claims and arbitration. The very purpose of announcing such a broad remedial approach was undercut by footnote 21 and the different interpretations of it. . . . The Court's position is ambiguous. If *Gardner-Denver* really means that deferral to arbitration is preferable under certain circumstances, the Court should have articulated such a standard. Rejecting completely the appropriateness of arbitration in Title VII matters, only to repostulate a standard of deferral . . . makes implementation of *Gardner-Denver* more like solving a riddle. *Id.* at 627-28.

²⁸⁵ Williams, *A Modest Proposal for the Immediate Future*, 1976 PROC. OF THE TWENTY-NINTH ANN. MEETING NAT'L ACAD. OF ARB. 34, 42-45.

²⁸⁶ Feller, *The Role of Arbitration In State And National Labor Policy*, 1975 PROC. OF THE TWENTY-FOURTH ANN. MEETING NAT'L ACAD. OF ARB. 42, 80; Linn, *Situation Ethics And The Arbitrator's Role*, 1973 PROC. OF THE TWENTY-SIXTH ANN. MEETING NAT'L ACAD. OF ARB. 162, 176.

²⁸⁷ Luskin, *The Presidential Address: Arbitration And Its Critics*, 1968 PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARB. 125, 126; Ryder, *The Impact of Acceptability On The Arbitrator*, at 94, 100-01.

²⁸⁸ Seitz, *Some Observations On The Role Of An Arbitrator*, 34 ARB. J., Sept. 1979, 3.

What is being put forward here requires an appreciation of the objectives of an arbitration hearing beyond the fundamental purpose of affording a fair hearing to the parties. The purpose of the hearing is misconceived if it is seen merely as a theatre affording the advocates an opportunity to act out the script they had written for themselves (or which

Arbitrators purporting to determine disputes involving both a breach of the collective agreement and a possible violation of Title VII must now add to the above noted skills a knowledge of employment discrimination law and practice.²⁸⁹ Arbitrator competence may therefore be justifiably regarded as the most crucial of the Footnote 21 requirements because, where it is lacking, the observance of the remaining criteria would be rendered futile. Even leaving aside the allocation of weight to an arbitral award in the federal forum, a high degree of competence will still be required in order to make arbitration function effectively as a settlement producing mechanism.²⁹⁰ Continued resort by unions and employers to the labor arbitration process for resolution of their grievances testifies to the fact that they repose a considerable amount of confidence in the knowledge and skills of arbitrators. As Title VII considerations become increasingly intertwined with those of collective bargaining, through the agency of the collective agreement, a higher premium will be placed on the competence of labor arbitrators. With the development of such competence by arbitrators, the Supreme Court might be persuaded to reconsider the theoretical basis of its rejection of dererral to arbitration, and they might provide a form of guidance more consonant with both the objectives of the Title and the realities of enforcement in the world of labor relations.

their client desires to be acted out). If the arbitrator does not conduct the hearing with a strong and active hand, it can deteriorate rapidly into a travesty. Counsel, moving from a courtroom into an arbitration hearing, will defeat the goals of the arbitration process. Arbitrators who fail to conduct and give proper direction to a hearing so that it will develop the kind of record required, fail in their professional responsibilities.

Id. at 7.

²⁸⁹ Wolkinson & Liberson, *The Arbitration of Sex Discrimination Grievances* 37(2) *ARB. J.*, June 1982, 35.

In many cases the application of traditional rules of contract construction to just cause, seniority, and non-discrimination provisions, as well as the application of standards of reasonableness and fair play, have contributed to the protection of minority rights. Additionally, *the basic harmony between legal policy and arbitration reflects the increased willingness of arbitrators to apply external law when adjudicating contractual rights.* (emphasis supplied).

Id. at 43. See also Newman, *supra* note 281, at 47-51. For an interesting analysis of the ways in which some labor arbitrators treat employment discrimination principles in their decision-making see Coulson, *Title Seven Arbitration in Action*, 27 *LAB. L.J.* 141 (1976).

²⁹⁰ *Gardner-Denver*, 415 U.S. 36 (1974):

Where the collective-bargaining agreement contains a non-discrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

Id. at 55.

